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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 87.

AXEL W. HALLENBORG AND J. EDWARD ADDICKS, Appellants,

vs.

COBRE GRANDE COPPER COMPANY, E. B. GAGE, W. M. ADAMSON, JOHN H. COSTELLO, J. HENRY WOOD AND CON. O'KEEFE, ITS DIRECTORS; WILLIAM C. GREENE, GEORGE MITCHELL, PHOENIX NATIONAL BANK, OF PHOENIX, ARIZONA TERRITORY, CANANEA CONSOLIDATED COPPER COMPANY, AND GREENE CONSOLIDATED COPPER COMPANY, Appellees.

Appeal from the Supreme Court of the Territory of Arizona.

STATEMENT AND BRIEF FOR APPELLEES.

BEN GOODRICH,
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ALEXANDER BRITTON,
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Appeal from the Supreme Court of the Territory of Arizona.

STATEMENT AND BRIEF FOR APPELLEES.

The Bill of Complaint.

The case alleged by the complaint, omitting formal and immaterial matter, is substantially thus:

Plaintiff sues in behalf of himself and all other stockholders of the Cobre Grande Copper Company, and all other creditors of said Company similarly situated who desire to come in and contribute to the expenses of the action, and alleges:

I.

That the Cobre Grande Copper Company is a corporation organized under the laws of Arizona Territory, having its principal office at Phoenix, Arizona, with a capital stock of $500,000.00 divided into 200,000 shares of $2.50 each. That defendant Gage is and has been a director and president of said corporation since November 14, 1899; that defendants Adamson, Costello and O'Keefe are and have been since November 27, 1900, directors of said corporation; that defendant Wood is now and has been since November 27, 1900, a director and secretary of said corporation; that defendant Phoenix National Bank of Phoenix, Arizona, is a corporation organized under the Laws of the United States, having its principal place of business at Phoenix, Arizona.

That defendant Cananea Consolidated Copper Company is a corporation organized under the laws of the State of Sonora in the Republic of Mexico.

That the Greene Consolidated Copper Company is a corporation organized under the laws of West Virginia, and the defendant Greene is now and has been since prior to January 1, 1900, president of said last named corporation, and a large stockholder therein. That defendants Greene and Mitchell, and their associates, confederates and agents are now and have been since the organization of said corporation, in control of and the

actual managers of both the Cananea Consolidated Copper Company and the Greene Consolidated Copper Company.

1½.

That plaintiff Hallenborg resides in the City, County and State of New York, and defendants Gage and Adamson reside in Yavapai County, Arizona; that defendant Wood is a resident of Maricopa County, Arizona, and defendants Greene, Mitchell and O'Keefe reside in Cochies County, Arizona.

II.

That plaintiff is now and for a long time has been a stockholder in and creditor of the Cobre Grande Copper Company, and is now a creditor of said corporation of upwards of $40,000.00, part upon notes and part upon open account.

That plaintiff is the owner and holder of promissory notes made by the Cobre Grande Copper Company, of the dates, amounts and payable as follows, viz:

Date.	Amount.	Payable.
January 19, 1900....	$12,000.00.....	April 15, 1900
March 8, 1900.....	14,175.00.....	May 15, 1900
May 1, 1900.....	6,000.00.....	August 1, 1900
May 23, 1900.....	4,000.00.....	August 24, 1900
August 18, 1900.....	1,000.00.....	Nov. 18, 1900
June 29, 1900.....	1,905.25.....	October 1, 1900

Of the above mentioned notes, the first two were made payable to the order of one Benjamin Orne, and were

on November 13, 1900, transferred by Orne to plaintiff, and that plaintiff is now the holder and owner thereof; each of said notes bears interest at the rate of six per cent per annum from date. That nothing has ever been paid thereon, and that the whole amount payable by the face of said notes, viz: $39,080.25 and interest on the amount of each note from the date thereof is now due and owing.

That defendant Cobre Grande Copper Company is also indebted to plaintiff several thousand dollars for cash advances by plaintiff to the said corporation, for which no notes have been issued.

That plaintiff is a stockholder in the Cobre Grande Copper Company of upwards of 8,000 shares, and has been since about the 15th of July, 1900.

III.

That since prior to January 1, 1900, the Cobre Grande Copper Company has been engaged in a series of litigations with defendants Greene, Mitchell, and their associates and confederates, which litigations are as follows, and were based upon the claims, charges and allegations made by the Cobre Grande Copper Company in that behalf.

That in the fall of 1899 the Cobre Grande Copper Company was in possession of certain valuable mining properties situated in the Cananea Mountains, State of Sonora, Republic of Mexico, under and by virtue of a contract originally made by defendant Greene, then the owner of said properties, to defendant Mitchell, and by said Mitchell, about May 26, 1899, transferred to defendant Cobre Grande Copper Company with

the consent of said Greene, by virute of which contract and transfer and consent, the defendant Cobre Grande Copper Company became entitled to the ownership and possession of said mining properties. Thereafter, about September, 1899, defendants Greene and Mitchell, being at that time directors of the Cobre Grande Copper Company, in confederation with certain others, formed a scheme to deprive the Cobre Grande Copper Company of said property and acquire it for themselves; and on or about October 11, 1899, in pursuance of this scheme by certain fraudulent tricks and devices, they obtained the actual possession of said properties and ousted therefrom the defendant Cobre Grande Copper Company and its agents and servants; said Greene being then in physical possession of said properties, claimed to be the owner of them, and thereupon, in confederation with one of his attorneys, Norton Chase, he organized under the laws of Sonora, Republic of Mexico, where the mines were situated, the corporation Cananea Consolidated Copper Company; the said corporation, however, being in fact composed only of himself and attorney, said Norton Chase. Thereupon Greene executed, in apparent conformity with the laws of the Republic of Mexico, a deed of all said properties, of which he had unlawfully taken possession, to the Cananea Consolidated Copper Company, and since then the said corporation has claimed to be the owner thereof and has exercised acts of dominion and control over them. That the said Cananea Consolidated Copper Company has never of itself carried on any business, and the object of forming it was to comply with the laws of Mexico, which prevent a foreigner or a foreign corporation from owning land within what is known as the "Prohibited Zone," in which district said mines are

situated, and that all of the stock of the Cananea Consolidated Copper Company was immediately transferred by Greene to defendant the Greene Consolidated Copper Company, which said Greene caused to be organized under the laws of West Virginia with a capital stock of $5,000,000, divided into five hundred thousand (500,000) shares of the par value of $10.00 each, and since then said Greene Consolidated Copper Company has claimed to be the owner of and to be operating said mines of which defendant Cobre Grande Copper Company was ousted by the defendant Greene, and has largely advertised the sale of its stock and claimed to have a good and clear title to said property, but both the Cananea Consolidated Copper Company and the Greene Consolidated Copper Company were and are mere tools and instruments used by Greene and his confederates in furtherance of their fraudulent schemes and organized solely for that purpose.

That upon being ousted from said property, the Cobre Grande Copper Company instituted certain legal proceedings in the courts of Sonora, Mexico, where said property is situated, to recover possession of same and appurtenances and supplies from defendants Greene, Mitchell, the Cananea Consolidated Copper Company, and the Greene Consolidated Copper Company, and for the recovery of a large amount of the product of said mines appropriated by said last named defendants, or by Greene, to their own use, and the said proceedings are still pending and undetermined.

That defendant, the Greene Consolidated Copper Company, after having, by the means aforesaid, gotten into possession of said mines, proceeded to extract ore therefrom and to turn it into copper matte, and to ship same to various places in the United States; and that there-

upon the Cobre Grande Copper Company claiming under the agreement between Green and Mitchell and assigned to and owned by it, to be the owner of the ore in said mines, about the months of January and August, 1900, brought action in the nature of replevin to recover possession of the matte so shipped, which actions were brought in New York City and at El Paso, Texas, and that thereupon the Greene Consolidated Copper Company, or some of its agents, attorneys or confederates, put in an adverse claim to same, and that the litigation in regard to said matte called the "matte suits,' is still pending and undetermined.

That Greene and Mitchell and their confederates, also attempted to get control of defendant Cobre Grande Copper Company by use of stock held by them in that Company, which was less than the majority thereof, and they claimed and pretended in November, 1899, to have held a regular meeting of stockholders for the purpose of electing directors of said Company, and claimed that said Greene, Mitchell and certain of their confederates had been duly elected directors of said Company and officers thereof, although as a matter of fact the meeting at which they claimed to have been elected directors, was not a regular meeting of stockholders, and that thereupon Greene, Mitchell and their confederates claimed that they were such officers and directors of the Cobre Grande Copper Company and endeavored to exercise the powers and functions of such officers and directors; and about the month of December, 1899, upon an application of defendant Gage, who was at that time the duly elected President of the Cobre Grande Copper Company, proceeding in the nature of *quo warranto* was taken by the Attorney General of Arizona to enjoin said Greene and his confederates from acting or assuming to

act as officers and directors of the Cobre Grande Copper Company, and that said action and proceedings is still pending and undetermined.

That said Greene and his confederates in order to further embarrass the Cobre Grande Copper Company, and hinder and delay it in the prosecution of its rights against them, about the month of December, 1899, caused one Isabella Chase, one of its confederates and stockholders, or pretended stockholders in the Cobre Grande Copper Company, to apply to the courts of the Territory of Arizona for a receiver of said corporation, on the ground of insolvency, and for other reasons, and that said suit is now pending in the courts of Arizona Territory undetermined.

That defendant Greene confederating with defendant Mitchell and other persons interested with him in the Greene Consolidated Copper Company, also claimed and pretended that the contract between Greene and Mitchell for the sale and purchase of said mines had lapsed and terminated on account of the failure to make a certain payment of $37,500.00 thereon which was claimed to have been due on November 26, 1899, and thereupon said Greene applied to defendant Phoenix National Bank of Phoenix, Arizona, to deliver to him certain deeds to the said mines which had been placed in escrow with said bank by defendants Greene and Mitchell; and thereupon the Cobre Grande Copper Company brought an action in Maricopa County, Arizona, against Greene and Mitchell and the Phoenix National Bank to prevent the delivery by it of said deeds, and to have the rights of the Cobre Grande Copper Company in and to said contract of sale and purchase determined and adjudged. That said action was brought in aid of the efforts of the Cobre Grande Copper Company to recover the said

properties in Mexico, and a part of the relief demanded in said action was that the plaintiff therein, the Cobre Grande Copper Company, might be permitted, within a reasonable time after its restoration to the possession of said mines, to make said payment of $37,500.00, which payment it was alleged Greene and Mitchell had prevented by their fraudulent acts and misconduct as aforesaid, and further that Greene might be required to account to the Cobre Grande Copper Company for the proceeds of the product of said mining claims together with all supplies, material and property of the Cobre Grande Copper Company taken and appropriated by him.

That all the defendants in that action appeared therein and answered on the merits. A preliminary injunction was granted by the court in accordance with the prayer of the complaint restraining the delivery of said deeds, and an order made continuing the same pending the action, and the cause was duly tried before Hon. Webster Street, Judge, and a decision thereon reserved, all on or before December 1, 1900, and all on or before the agreement to discontinue as hereinafter set forth, and there was and is much and reasonable probability of said action being decided favorably to the Cobre Grande Copper Company, as plaintiff has been informed by counsel learned in the law and verily believes, and the said action is pending and undetermined.

That each and every one of said litigations, suits, actions and proceedings were a part of the dispute and controversy originating out of and connected with the claim of said Greene and his agents, including the Cananea Consolidated Copper Company and the Greene Consolidated Copper Company to get control and possession of all the property of the Cobre Grande Copper Company and especially of the mining property afore-

said; and each and every of said suits, actions and proceedings which were begun and commenced by the Cobre Grande Copper Company or in its behalf, were meritorious and well founded in law and in equity, and all were necessary steps and proceedings to defeat the fraudulent schemes and designs of said Greene and his confederates, associates and agents aforesaid, and to save and protect the property and the existence of the Cobre Grande Copper Company, and in each and every of said actions and proceedings where the Cobre Grande Copper Company appeared as defendant, it was defending for the purpose of maintaining its just rights and claims to its property against the unlawful attacks of said Greene, his confederates, associates and agents, made in pursuance of said fraudulent schemes. By means of the corrupt, wicked and unlawful acts and misconduct of defendants, Greene, Mitchell and their confederates, including the Cananea Consolidated Copper Company and the Greene Consolidated Copper Company, the Cobre Grande Copper Company, whose directors and trustees Greene and Mitchell were or claimed to be when they ousted said corporation from its property, has been unlawfully deprived of the possession and use and enjoyment of its property, and the proceeds thereof have been diverted to the use of Greene, Mitchell, and their confederates, and by the same means the said Greene, Mitchell and the said two corporations organized by them, claimed to have deprived the Cobre Grande Copper Company of all right and interest in and all right to recover possession of said property, to the ruin and destruction of the Cobre Grande Copper Company and the great loss and damage of the plaintiff as a stockholder therein and creditor thereof, and a like loss and damage of other persons similarly situated.

IV.

That just prior to December 12, 1900, defendants Greene, and the Greene Consolidated Copper Company, their associates, confederates, etc., conspired together to get control of the Cobre Grande Copper Company in order to stop the litigation against them and secure the undisputed possession of the mines from which the Cobre Grande Copper Company had been ejected, and for the purpose of controlling the suits brought by the Cobre Grande Copper Company as aforesaid, in which they anticipated an unfavorable decision, which would restore the Cobre Grande Copper Company tc possession of its property and to deprive the Greene Consolidated Copper Company of the property belonging to the Cobre Grande Copper Company upon which its stock had been issued and which was then selling in the market at $10.00 per share; and thereupon they entered into a fraudulent contract and conspiracy with defendant Gage and the other directors of the Cobre Grande Copper Company, whereby it was agreed between Greene and the Greene Consolidated Copper Company by said Greene as its president on one side, and the defendant Gage and the Cobre Grande Copper Company by Gage as president on the other side, as follows: Defendant Gage then held as trustee for certain stockholders of the Cobre Grande Copper Company 115,049 shares of its capital stock, being a majority thereof, the power to dispose of same, and thereupon defendants Greene and the Greene Consolidated Copper Company agreed to buy of said defendant Gage said shares of stock at $2.50 per share, and Gage and the other defendants, Adamson, Costello, Wood and O'Keefe, directors of said corporation, as part of said transaction agreed that upon pay-

ment of said stock being made they would each and every of them resign as directors of the Cobre Grande Copper Company, and that Greene and the Greene Consolidated Copper Company should be allowed to elect and appoint officers and directors of the Cobre Grande Company in their own interest; and that further, all suits and proceedings above mentioned brought by the Cobre Grande Company for the protection of its rights against Greene, Mitchell and the Greene Consolidated Copper Company, should be dismissed, to the end that no claims should be made by the Cobre Grande Copper Company for and in respect of the said property in Mexico of which it had been ousted by Greene and his confederates. It was further agreed that Gage should have and receive 5,000 shares of the stock of the Greene Consolidated Copper Company for his own benefit, which stock was at that time selling on the market at $10.00 per share; and it was further agreed that defendant Costello, a director of said corporation, should have his note of $23,000.00 to the Cobre Grande Copper Company surrendered to him.

That said agreement which was made about December 12, 1900, did not provide for any personal benefit to the other directors, Adamson, Wood and O'Keefe, except the purchase of stock held by them in the Cobre Grande Copper Company; but plaintiff alleges on information and belief, that by a secret compact made between them and Greene and the Greene Consolidated Copper Company, each of them has contracted for and expects to receive large personal gain, either by transfer to him, or for his benefit, of stock in the Greene Consolidated Copper Company, or by some other transfer or payment to him, or for his benefit.

That the agreement of December 12, 1900, was made

by Gage acting for and on behalf of the Cobre Grande Copper Company as president thereof, and as trustee for the holders of said 115,049 shares of the stock above mentioned, and was made with the knowledge and consent of the other directors of the Cobre Grande Copper Company, to wit: defendants Adamson, Costello, Wood and O'Keefe; and thereafter all of said defendants held a meeting as directors of the Cobre Grande Copper Company and assumed to ratify said agreement on behalf of the Cobre Grande Copper Company and said directors and each of them have conspired together to carry out the same, and intend and threaten to carry out said agreement and turn over the management of the Cobre Grande Company to its enemies and plunderers, the said Greene and the Greene Consolidated Copper Company. And in view of the facts and circumstances aforesaid, any application to the directors or officers of the Cobre Grande Copper Company to take action in the premises to protect the rights of plaintiff and other stockholders and creditors similarly situated, would be unavailing.

That said agreement was and is illegal and fraudulent as to plaintiff and all creditors and stockholders similarly situated, and the object and effect thereof was to transfer to the opponents and enemies of the Cobre Grande Copper Company the control of that corporation with intent and design to prevent the enforcement of its just claims against said Greene and the Greene Consolidated Copper Company and their agents and confederates who were in possession of and unlawfully withholding the property of said Company and to enable Greene and his confederates to destroy the rights of the creditors and minority owners of the stock in said Cobre Grande Company, including plaintiff.

V.

That said mining claims in Mexico concerning which said litigation exists and of which the Cobre Grande Company has been endeavoring to obtain possession and which are unlawfully withheld by Greene and the Greene Consolidated Copper Company, constitute the entire property of the Cobre Grande Company, and upon the discontinuance of such suits the Cobre Grande Company will have no property or funds to pay its debts or distribute as dividends among its stockholders; and said last named agreement is illegal and fraudulent and a total failure on the part of the officers and directors of the Cobre Grande Company to legitimately perform the duties of their trust and a virtual repudiation thereof by them, and if allowed to be carried out of this court, will destroy the interests of plaintiff as a creditor and stockholders and all others similarly situated.

The mining property of which the Cobre Grande Company is seeking to recover possession, is of great, present, and prospective value, namely, $5,000,000.00 or thereabouts.

That plaintiff purchased the stock of said corporation and advanced money as aforesaid for the purpose of legitimately developing the property and of investing therein and holding said stock as an investment with the view of the development of said property and the large appreciation of said stock in value. That part of the intent of the transaction of December 12, 1900, was and is to compell plaintiff and other stockholders similarly situated to sacrifice their stock to Greene, Mitchell and their confederates at $2.50 per share or less, whereas the said stock is worth much more, and plaintiff expects, if

the property is properly managed, that said stock will appreciate in time to $25.00 per share.

That defendants Greene and Mitchell and the said two corporations controlled by them, and their confederates, threaten and intend to carry out the scheme aforesaid to wreck the Cobre Grande Company and compel the minority stockholders to sell their stock to them at terms to be dictated by said Greene, Mitchell, and their confederates, when they shall be in control of a majority of said stock, and ultimately to turn over all the assets and property of the Cobre Grande Company to Greene and Mitchell, or the Greene Consolidated Copper Company, or some other combination controlled by them.

That neither Greene, Mitchell, nor the Cananea Consolidated Copper Company, nor the Greene Consolidated Copper Company is nor are they responsible or any of them able to respond in damages to plaintiff for the wrongs perpetrated and intended by them, nor has plaintiff, nor will he have, any adequate remedy in law.

That the Cananea Consolidated Copper Company is a foreign corporation without property in Arizona or the United States, and that it and the Greene Consolidated Copper Company and each of them are without assets of any kind, the only property claimed to be owned by them consisting of the properties of the Cobre Grande Copper Company unlawfully seized and taken by them as aforesaid.

The prayer is, that the Cobre Grande Copper Company and the defendants, its directors and officers, and all others, be enjoined from discontinuing or dismissing the actions and proceedings now pending in its behalf, or in which it is interested, namely the actions and proceedings in the nature of replevin pending in the States of New York and Texas, for the recovery of said matte, or

the proceeds thereof, or to establish a lien thereon; that they be enjoined from discontinuing or dismissing the two suits pending in the district court of Maricopa County, Arizona, and from abandoning or dismissing the actions or proceedings pending on behalf of the Cobre Grande Copper Company in Mexico or elsewhere for the recovery of the mines and property rights of the Cobre Grande Copper Company, and for a mandatory injunction directing the Cobre Grande Copper Company and the defendants, its officers, directors, etc., to faithfully prosecute in its behalf all actions and proceedings brought by any of the defendants for the recovery of said property or property rights, or any property or rights of the Cobre Grande Copper Company. That plaintiff be made a party plaintiff to said actions and proceedings so far as necessary to protect his rights; that it be adjudged that he have a right to intervene in said suits and proceedings in Arizona, New York, Texas, or elsewhere, for the protection of his interest and other persons similarly situated.

That defendants Gage, Adamson, Costello, Wood and O'Keefe be removed as directors, president and secretary respectively; that a receiver be appointed to take possession of the assets and property of the Cobre Grande Copper Company, and to prosecute the claims aforesaid and to recover, protect and defend said properties, claims, etc., from and against Greene, Mitchell, and their confederates, and the remaining defendant corporations herein, and to defend the Cobre Grande Copper Company from the conspiracies and assaults of said defendants, and to operate said mines.

That defendants Greene and Mitchell be restrained from demanding and receiving from the Phoenix National Bank, or other custodian, the papers and docu-

ments constituting and evidencing the title to said properties; that the Phoenix National Bank be restrained from delivering said papers and documents to the defendants Greene or Mitchell, or either of them, or to any other person or corporation except the Cobre Grande Copper Company, or said receiver, and that the time for the payment of the installment of $37,500.00, and all other installments under said contract for the purchase of said mining properties of said Cobre Grande Copper Company, be extended to a reasonable time after it shall be restored to the possession of said mining claims, or to such other times as to the court may seem just.

That defendants Greene, Mitchell, Cananea Consolidated Copper Company and the Greene Consolidated Copper Company be required to account to the defendant Cobre Grande Copper Company for the property of said Company, including the product of the mines, supplies and material appropriated by them, and to pay any amount due on such accounting, and for such further relief as may be just, and costs. (Tr. of Rec., pages 1 to 11.)

THE ANSWERS.

Cananea Consolidated Copper Company, Greene Consolidated Copper Company and William C. Greene.

Cananea Consolidated Copper Company, Greene Consolidated Copper Company and Greene, in their answer plead to the jurisdiction of the court, and allege that the complaint does not state a cause of action; that it is multifarious, combines several distinct and separate causes of action; that the complaint states no ground for equitable relief; and further answering, denies each and every material allegation of the complaint; denies that plaintiff is either a stockholder or a creditor of the Cobre

Grande Company; denies all the allegations of fraud or fraudulent conspiracy; denies that the Cobre Grande Copper Company is or ever was the owner of the mining ground alleged in the complaint, or was ever entitled to the possession of same.

Avers that the indebtedness alleged in the complaint was made for no good or lawful consideration; that if said notes were executed or money advanced as alleged, it was for an illegal and champertous purpose to abet litigation and controversy in which plaintiff had no interest, and for stock jobbing purposes, and in order that he might purchase stock of defendant Greene Consolidated Copper Company at a less price than what it was selling for in the market; that the consideration is void as against public policy; that defendants further allege on information and belief, that the Cobre Grande Copper Company has long since paid to plaintiff all of said indebtedness; alleged that there was filed in the District Court of the Third Judicial District of Arizona in and for Maricopa County, on November 25, 1899, a certain suit, wherein the Cobre Grande Copper Company was plaintiff, and Greene, Mitchell and the Phoenix National Bank were defendants, No. 3437 upon the docket of said Court, and in which suit the Cobre Grande Copper Company alleged in substance all of the allegations set forth in paragraph 3 of the original complaint filed in this cause. That answers were filed in the said suits by defendants and issue joined.

That said cause proceeded to trial on the issues involved, large numbers of witnesses were called, trial consumed from six to ten days of uninterrupted proceedings of the Court; that the cause was finally submitted for decision, and that the Court having fully considered the cause and the allegations in the complaint,

found the issues for defendants, and found that the Cobre Grande Company had not performed the conditions of its contract set forth, and had forfeited all its rights and titles by virtue of the contract alleged between Greene and Mitchell and assigned to the Cobre Grande Copper Company, and the supplemental contract with Greene and the Cobre Grande Copper Company as alleged in paragraph 3 of said complaint. Found that Greene had not wrongfully taken possession of said property; that said Company had failed to perform the condition of its contract to pay the purchase price for said mining ground by no fault or wrong of Greene, and ordered that the injunction restraining the bank from delivering the contracts alleged in said paragraph 3 be dissolved; that the defendant bank be ordered to deliver the said escrow papers and contracts in its custody to Greene for the reason that the Cobre Grande Copper Company had forfeited all its rights thereunder. Pleads said judgment in bar of this action. Also pleads that on January 31, 1900, there was commenced in the 34th Judicial District of the State of Texas in El Paso County of said State, a certain suit wherein the Cobre Grande Company was plaintiff and Greene, Mitchell, Geo. A. Treadwell and Win Wiley were defendants, in which plaintiff alleged in substance all of the allegations set forth in paragraph 3 of the original complaint filed in this cause. That issues were joined in said suit, and that the case was submitted to a jury and the jury found against the plaintiff and in favor of the defendants, which judgment was pleaded in bar.

They further allege that the contract of December 12, 1900, was the result of several days negotiations as to its terms and conditions. That prior to that time 115,000 shares of the stock of the Cobre Grande Copper

Company had been placed in the hands of defendant Gage as trustee with power and authority by him and on his part to act for all the beneficiaries of said trust; that among the beneficiaries was plaintiff Hallenborg who placed in the hands of said Gage, under and by virtue of said trust, 8,000 shares of the stock of the corporation, and that at the time of the negotiations all of Hollenborg's stock was in the hands of Gage. That by virtue of the terms of the contract of trust by which defendant Gage held the stock, said Gage was made attorney in fact for all the beneficiaries of said trust, including Hallenborg; that he was authorized to sell all of said stock so put in his hands at such price and upon such terms as he might see proper; that there were in the neighborhood of twenty or more owners of stock besides plaintiff; that most of them were not present during the negotiations, had no knowledge thereof and therefore it was provided in said contract that any of the stockholders named in said trust "may withdraw their stock from this agreement," to wit, the agreement of December 12, 1900, if they so wished to do; but said defendants allege that said Hallenborg was and in the person of and by his attorney in fact and his attorney-at-law authorized and representing him, to wit, one Grant Bennett, present in Phoenix at the time said negotiations which led up to the contract of December 12, 1900, was present at all conferences and consultations with reference thereto between Gage and his representatives and said Greene acting for the Greene Consolidated Copper Company, and also in all the consultations between Gage and the beneficiaries of the trust in his hands, and that he had full knowledge of all the negotiations as they progressed, suggested changes and modifications in the terms of the contract, all of which were complied with, and that he, said

Bennett was, during the negotiations, in telegraphic communication with plaintiff, and that plaintiff was fully informed of all the negotiations; that said Bennett fully approved the same, and but for his approval on behalf of plaintiff, Greene would not have executed said contract, and by reason and by virtue and in consideration of the approval and consent of said attorney on December 12, 1900, the contract was executed on behalf of Greene, and fifty cents per share for 115,000 shares, the first payment therefor provided in said contract, was paid to Gage, for which $4,000.00 was paid to Gage on behalf of plaintiff and with the knowledge and approval and complete ratification of plaintiff by and through his attorney in fact Grant Bennett.

That thereby the first consideration in the performance of said contract was executed by Greene, and he was induced by plaintiff and said attorney to pay over to Gage more than $50,000.00 in cash for the beneficiaries of said contract, $4,000.00 of which was paid for the benefit of Hallenborg, and thereby Hallenborg became party to and bound by the terms of said contract of December 12, 1900, and that Greene was induced thereby and thereafter performed all the conditions of said contract paid to the said Gage the full amount of $2.50 per share for said stock as provided in said contract, and all other terms and conditions of same were performed by Greene, and the said contract having been executed and been partly performed by Greene with the knowledge, consent and approval of said Hallenborg by his attorney in fact and attorney-at-law, said Hallenborg is estopped to repudiate and prevent the execution of said contract on the part of Gage and the repudiation of said contract by Hallenborg is a loss to Greene of the benefits of the contract, and after he had partly executed

the same. And by way of setoff and reconvention, defendants allege that the repudiation of the contract and the violation of its terms by Hallenborg, is a breach, and that thereby defendants have been injured and damaged in the sum of more than $100,000.00.

They allege that after the contract had been partly executed by Greene by the payment of fifty cents per share for 115,000 shares of the stock, Hallenborg in repudiation of and violation of the contract ratified and confirmed on December 12, 1900, appeared in said Court in Maricopa County in said case after same had been submitted for decision and asked to be allowed to intervene and set up all the matters set forth in paragraph 3 of the original complaint filed herein. Alleged fraud and fraudulent conspiracy on the part of the parties to said contract; that the Cobre Grande Copper Company had been defrauded of its rights; that it was the owner of the mining ground in Mexico when he, plaintiff, knew that said Company did not own and never had owned any mining lands in Mexico or elsewhere, falsely alleging that all the mining ground which was owned or claimed by defendant Greene Consolidated Copper Company was really and in fact owned by Cobre Grande Copper Company, and that by the fraudulent conspiracy set forth in paragraph 3 said Cobre Grande Copper Company had been deprived of its rights in Mexico, also alleged in his complaint all the allegations in this complaint contained, and having filed the said petition for intervention, he caused the same to be published far and wide in newspapers throughout the country, and that the said petition in intervention was not made in good faith, but for the purpose of publishing the allegations in said complaint; that the said suit was not commenced in good faith for the purpose of enforcing any rights but

for the purpose of bearing the stocks of the Greene Consolidated Copper Company and the value thereof, in order that he might purchase the same for less price, and that the suit was brought for the purpose of publishing to the public throughout the country and to the knowledge of proposed purchasers of stock of the Greene Consolidated Copper Company for the purpose of injuring said Company and defendant Greene. That said proceedings was followed afterwards by this suit for the same purpose and another suit was brought in New York in which the same allegations are made. That all of these suits were from time to time heralded throughout the country in newspapers; and publication was paid for by plaintiff, and the same was brought by plaintiff to injure the stock and value of the stock of the Greene Consolidated Copper Company to the injury of said Company and of said Greene. That the same was a slander upon the title to the real estate owned and operated by the Greene Consolidated Company, and that the Greene Consolidated Copper Company is a mining company operating large and extensive mines in Mexico and its stocks have great value, and that the market value of same has been injured and lessened, and proposed purchasers have been induced not to do so by publications of Hallenborg, whereby by this suit and other suits and said publication, defendants have been damaged in a sum in excess of $100,000.00, which they pray may be allowed as a setoff and recoupment.

They also allege by way of setoff and reconvention, that plaintiff as a stockholder of the Cobre Grande Copper Company knew that the Cobre Grande Copper Company did not own and never owned any mining ground in Mexico or elsewhere.

Allege that the Cobre Grande Copper Company had

a contract by which it had a right to purchase mining grounds in Mexico; that deeds for the conveyance of same were placed in escrow to be delivered upon the payment of the purchase price; that the purchase price has not been paid; that all the rights, titles, claims, etc., of the Cobre Grande Copper Company and of plaintiff as a stockholder, have been lost and forfeited by its failure to perform the conditions of the escrow contracts; that the claim to own the mining grounds hereinbefore described, is a cloud upon the Green Consolidated Copper Company to the mining grounds included in said escrow contracts and is an injury to the rights of the Greene Consolidated Copper Company. That the claim of title or ownership to the mining grounds since acquired from Greene by conveyance to the Greene Consolidated Copper Company is without right. That in suit No. 3437 in the District Court of Maricopa County, Arizona, all the rights of the Cobre Grande Copper Company were fully and completely adjudicated, and all claim of right of the Cobre Grande Copper Company was adjudged to be lost and forfeited and that the Cobre Grande Copper Company has no right or interest in and to the said mining grounds, and prays for judgment accordingly. (Trans. Rec., pp 12-20)

John H. Costello.

Defendant Costello admits the allegations contained in paragraphs 1 to 3 of complaint; admits that prior to and about December 12, 1900, that Greene and the Greene Consolidated Copper Company and associates sought to secure the control of the Cobre Grande Copper Company, but whether the purpose was, as alleged, to stop litigation and secure undisputed possession of the mines, defendant has no knowledge sufficient to affirm

or deny. Says he has no knowledge that the parties securing control of the Cobre Grande Copper Company anticipated an unfavorable decision in pending suits; has no knowledge of the Greene Consolidated Copper Company stock selling on the market at $10.00 per share, nor of the entering into fraudulent or corrupt conspiracy on the part of Gage and other directors of the Cobre Grande Copper Company with Greene and the Greene Consolidated Copper Company. Alleges that so far as he had anything to do with the contract as a director of the Cobre Grande Company or individually, his acts were not fraudulent or in pursuance of any conspiracy. Admits that Gage as trustee held the shares of stock as alleged, with power to dispose of the same, and that Greene and the Greene Consolidated Copper Company agreed to buy 115,049 shares, which was a majority of the stock, at $2.50 per share, and that upon payment in full of same, defendant, with the other directors of the Cobre Grande Copper Company, agreed to resign as such directors and allow the purchasers to elect their own directors and officers, and thus allow the new management to conduct its business as it saw fit, which would include the right to dismiss all pending suits. Admits Gage was to receive 5,000 shares of the stock of the Greene Consolidated Copper Company as a personal benefit; and that the note of this defendant for $23,000 was to be surrendered to him by the Cobre Grande Company. Has no knowledge or information on the subject that there was some secret compact with the directors Adamson, Wood and O'Keefe by which they were to receive personal gain from Greene or the Greene Consolidated Copper Company on account of the part they took as directors in the execution of the contract of December 12, 1900. Admits that said contract was made by Gage

acting as president of the Cobre Grande Copper Company and as trustee for 115,049 shares of stock, and was done with the consent of the directors; admits that said directors, he acting with them, held a meeting of the Cobre Grande Copper Company and assumed to and did ratify said agreement on behalf of said Company, and that it was their purpose to carry out said agreement in all respects as in the contract provided, and that had said Greene and the Greene Consolidated Copper Company carried out their part of said contract, this defendant and others for whom Gage was acting as trustee in executing said agreement, would have carried out and stood by the same.

Defendant denies that said agreement was illegal or fraudulent as to plaintiff or others, and that the intent and design was to prevent the enforcement of the claims of the Cobre Grande Company against Greene and the Greene Consolidated Copper Company. Admits that the mining claims in Mexico, concerning which litigation was pending when the contract of December 12, 1900, was made, constituted the sole property of the Cobre Grande Copper Company, and should it fail in its efforts to recover the same, it would have no assets with which to pay its creditors. Alleges that such fact was no concern of his in making the sale of his stock in the Cobre Grande Company. Admits the mining claims were of large value, and that plaintiff purchased stock therein and advanced the money claimed by him to have been done. Denies each and every allegation in the complaint charging conspiracy, collusion or corruption on his part, or any intent to injure plaintiff or others in securing their rights against the Cobre Grande Copper Company. (Tr., pages 20-22.)

Cobre Grande Copper Company, Phoenix National Bank, and Gage, Adamson, Wood and O'Keefe.

Defendants Gage, Adamson, Wood, O'Keefe, the Phoenix National Bank and the Cobre Grande Copper Company demur on the ground that the complaint does not state facts sufficient to constitute a cause of action, and answering to the merits.

Allege that there was instituted in the District Court of the Third Judicial District of Arizona in and for Maricopa County, on the —— day of ——, ——, a certain suit, wherein the Cobre Grande Copper Company was plaintiff and Greene, Mitchell and the Phoenix National Bank were defendants, No. 3437, in which the Cobre Grande Copper Company alleged, among other things, in substance all of the facts set forth in paragraph 3 in the original complaint on file in this action.

That issues were joined thereon; that the cause proceeded to trial on the issues involved, and that the court found the issues for the defendants, and that the Cobre Grande Copper Company had not performed the conditions of its contract set forth in said action, in the 3d paragraph of the original complaint in this action, and had forfeited all its rights under the contract alleged between Greene and Mitchell and assigned to the Cobre Grande Copper Company by said Mitchell, and the supplemental contract of Greene with the Cobre Grande Copper Company; also found that Greene had not wrongfully taken possession of the property, but that the Cobre Grande Company had failed to pay the purchase price for said mining properties, not by any fault or wrong of Greene, and gave judgment in accordance with the said findings and decree; that the temporary injunction enjoining the Phoenix National Bank from deliver-

ing the contracts, deeds and papers held in escrow by it be dissolved, and that the Phoenix National Bank be ordered to deliver the said escrow contracts, deeds and papers in its custody to Greene, and denied plaintiff's prayer for an accounting against said Greene.

The answer further alleged the judgment so rendered by said courts is in full force and effect, and has not been appealed from nor taken up to the appellate court of the Territory by writ of error or other proceedings, and plead the same in bar of plaintiff's right to recover in this action.

And defendants further say that at the time said judgment, and decree was rendered and for a long time prior thereto, plaintiff was a stockholder in the Cobre Grande Copper Company, and that the judgment against it is binding and conclusive against plaintiff by reason thereof.

Further answering these defendants allege that on January 31, 1900, there was commenced in the District Court in El Paso, Texas, a suit wherein the defendant Cobre Grande Copper Company was plaintiff, and Greene, Mitchell, Treadwell and Wiley were defendants, in which plaintiff alleged in substance all the allegations set forth in paragraph 3 of the original complaint filed in this case; and alleged, among other things, that plaintiff was entitled to the possession of the mining ground in the complaint herein described, and the right to extract and market the ores therefrom, and alleging that defendant Greene and others had wilfully and without right, forcibly deprived said Company of the possession of said mining ground and had extracted ores therefrom and converted the same into matte and shipped the same to the County of El Paso, Texas; that the proceeds of the same were in possession of the Con-

solidated Kansas City Smelting & Refining Company, and was of the value of $9,000.00, and that the same was the property of the Cobre Grande Copper Company by means of the premises alleged as aforesaid, and demanded judgment against the defendants for the proceeds of said matte.

That issues were joined upon said complaint in which Greene and others denied that the Cobre Grande Copper Company was the owner or lawfully entitled to said mining ground; that Greene and the parties claiming under him, had extracted ores from said ground, manufactured the same into matte, and shipped the same to El Paso rightfully, and that same was the property of defendant Greene and the parties claiming under him, to wit, the Consolidated National Bank of Tucson, and that said bank was the owner of said matte.

That after full trial and argument, the case was submited, under instructions of the court, to a jury, and the issues found against the plaintiff and in favor of said Consolidated National Bank as assignee, and privy to the rights of said Greene.

That the said bank derived its title to said matte rightfully; that Greene had the right to extract ores and manufacture matte as against plaintiff; that said court rendered judgment against plaintiff and in favor of the Consolidated National Bank upon its cross appeal asking that judgment be rendered in its favor against the Smelting Company for the value of said matte in the sum of $9,000.00; that said court found that the Cobre Grande Copper Company had not performed its contract between Greene and Mitchell of the 29th of November, 1898, and assigned to it, and the supplemental contract set forth in the complaint herein; and also found that the Cobre Grande Copper Company had forfeited

all its rights under said contract and the supplemental contract set forth in paragraph 3 of said complaint, and that Greene had not wrongfully taken possession of said property, and that said Cobre Grande Copper Company had failed to perform the conditions of its contract to pay the purchase price for said mining ground as alleged by no fault of Greene, and pleads the same in bar against the Cobre Grande Copper Company and plaintiff as a stockholder.

Denies all the allegations of the amended complaint except as specifically admitted.

Admits that Gage was a director and president of the Cobre Grande Copper Company from November 14, 1899, up to April 3, 1901, at which time he resigned as president and director, and his resignation was accepted, and since that time he has not been connected with said corporation.

Admits that Adamson, Costello, Wood and O'Keefe were directors of the Cobre Grande Copper Company from November 27, 1900, until April 3, 1901, at which time they resigned as directors, and their successors were elected and qualified. Alleged that about the month of November, 1898, and prior thereto, Greene owned certain properties in Sonora, Mexico, and had options to purchase other property there; that in November, 1898, Greene executed an option on the property then owned by him in Sonora and other property for which he had contracts to purchase to defendant Mitchell; that said contract provided that Mitchell should pay in cash at the execution of said contract $12,500.00 and $237,500.00 as follows:

$37,500.00 to be paid on or before November 26, 1899; $100,000.00 to be paid on or before November 26, 1900; $100,000.00 to be paid on or before November 26, 1901.

That afterwards, about the month of April, 1899, Greene and Mitchell, with the assistance of other parties, organized the Cobre Grande Copper Company under the laws of Arizona. The stock of the Company 200,000 shares of the par value of $2.50 each, was turned over to Mitchell in consideration of his contract with Greene, which contract between Greene and Mitchell was assigned to the Cobre Grande Copper Company subject to the rights of Greene therein. That thereupon the Cobre Grande Copper Company entered into and upon said property and began to operate the same.

That about the month of October, 1899, controversies arose between the Cobre Grande Copper Company and Greene over said contract and the right of possession of said mining property, and that about that time Greene entered into possession of said property. Thereupon the Cobre Grande Copper Company instituted a suit in the courts of Mexico to regain possession of said property, and also in the District Court of Maricopa County, Arizona, to restrain the delivery to the said Greene of the deeds which were put in escrow under said contract with Mitchell and thereafter assigned to the Cobre Grande Copper Company. That under the [illegible] named suit a temporary injunction was granted restraining said bank, as escrow agent of the parties, from delivering the escrow papers, and restraining Greene from demanding same from said bank.

That while said litigation was in progress, the Cobre Grande Copper Company was greatly embarrassed for funds to carry on said litigation, and in order to protect themselves the stockholders of said Company, or a majority thereof, comprising stockholders to the extent of about 115,049 shares, entered into a pooling arrange-

negotiate another option for the sale of said stock to raise money to carry on the litigation and to pay the debts of the Cobre Grande Copper Company.

That plaintiff Hallenborg and John H. Costello opened negotiations with said Gage and undertook to procure an option from him for the purchase of said stock at $2.50 per share.

That Grant R. Bennett, representing himself to be an attorney of New York City, and armed with a power of attorney from Hallenborg, came to Phoenix and personally opened negotiations in behalf of Hallenborg to procure an option to purchase the stock then held in pool by Gage. That Costello was personally present during this time, which occurred about the month of October, 1900. That various contracts were drawn and submitted for the consideration of the parties trying to effect a deal. And these defendants submitted to the court a form of contract which was drawn agreeable to and in conformity with the views and agreement as expressed by plaintiff through his attorney Grant R. Bennett.

This form of contract is shown in this record as Defendants' Exhibit Pooling Contract, unexecuted, page 144. That same was consented to by Hallenborg and his attorney Bennett, but objections were raised thereto by Costello, and Hallenborg being unable to or not desirous of entering into this contract alone and without Costello, for that reason the same was not signed.

Various other contracts were suggested and drawn of like tenor, all of which were consented to by the Cobre Grande Copper Company and Hallenborg, but were not satisfactory to Costello, and were rejected for that reason.

That these negotiations were kept up between plaintiff

and Costello on the one part, and Gage, Trustee, on the other, until about the first week in December, 1900, nothing resulting therefrom.

That the stockholders represented by Gage became restless and urged him to make the sale of said stock, and many of them were threatening to withdraw their stock from the pool and withdraw their power of attorney to Gage and sell their stock to Greene, unless Gage should negotiate with Greene at once.

That Gage realizing that nothing further could be done through Hallenborg and Costello, opened negotiations with Greene to sell the stock, and that Greene offered to purchase same upon better terms than anybody else had ever offered. That Gage consulted the directors and a large majority of the stockholders of the Cobre Grande Copper Company, and they urged him to enter into a contract with Greene for the sale of the stock. That the stock represented by Gage participating in said contract, comprised the entire stock of the Cobre Grande Copper Company, except that owned by Greene and his associates, and about 6,500 shares owned by other parties.

Thereupon Gage took the matter up with Greene, and after careful and thorough consideration and full negotiations, did, on December 12, 1900, enter into the contract marked Exhibit "B" in plaintiff's application for injunction and receivership filed in this case, which is asked to be made a part of the answer.

That after said contract was made, the Board of Directors and the stockholders of the Cobre Grande Copper Company met and ratified said contract in its entirety, and accepted the terms thereof.

That immediately upon executing said contract Greene paid fifty cents a share for each of said shares

represented in said pool, including fifty cents for each share then owned by plaintiff.

That all the stockholders accepted the money so paid to Gage and ratified said contract, except plaintiff Hallenborg, who returned the money sent to him and declined to be bound by said contract; and exclusively, as defendants are informed and believe, on the ground of his failure to become a purchaser of the stock himself.

That this contract was entered into in good faith and for the best interests of the Cobre Grande Copper Company and its stockholders, and was so believed by said Gage.

That when the payment of $37,500.00 fell due on November 26, 1899, under the option contract between Greene and Mitchell, and which was thereafter assigned to the Cobre Grande Copper Company, said Cobre Grande Copper Company being without funds was unable to make said payment, and never did make the same nor any part of the payments thereafter falling due under said contract.

That defendant Greene entered into possession of the mining property mentioned in the complaint about October, 1899, and thereupon the Cobre Grande Copper Company instituted suit No. 3437 in the District Court of the 3d Judicial District of Arizona in Maricopa County.

That said suit was on April 15, 1901, decided adversely to plaintiff and in favor of defendants.

That the suits mentioned in the complaint as pending in the State of New York, are, as defendants are informed and believe, still pending.

That the other suits mentioned in the complaint were all dismissed prior to the institution of this action, or otherwise disposed of by final judgment, except the suit

pending in the Republic of Mexico, and as to that, defendants are not informed.

Defendants pray that plaintiff take nothing by his action, and that they be dismissed with their costs. (Tr. pages 24-32.)

Intervention of J. Edward Addicks.

On December 28, 1901, J. Edward Addicks filed his petition of intervention, in which he alleged in substance that he is the owner of 5,000 shares of the stock of the Cobre Grande Copper Company, and was such at the bringing of this action.

Alleges that he brings this suit on his own behalf, and on behalf of all other stockholders and creditors of the Cobre Grande Copper Company who desire to come in and contribute to the expense of the action.

Adopts the allegations of plaintiff's complaint and joins in his prayer for relief. (Tr., pages 33-35.)

Replication of Plaintiff Hallenborg.

May 13, 1902, plaintiff Hallenborg filed a replication to the amended answer of E. B. Gage and others.

Demurs on various grounds, and further replying, denies that the Court of the 3d Judicial District of Arizona in and for Maricopa County, made the findings alleged in the answer of said defendants. Denies that there was any finding by said Court that the Cobre Grande Copper Company had forfeited its rights under the contract between Greene and Mitchell and assigned to the Cobre Grande Copper Company; denies that the Court found that Greene had not wrongfully taken possession of the property, and denies that the Court found that the Cobre Grande Company had failed to perform

the conditions of its contract to pay the purchase price of said property.

Avers that it is true that said judgment has not been appealed from, and that no writ of error had been sued out because of the conduct of said Gage and the other defendants answering with him in executing the contract of December 12, 1900, wherein all of the rights of the Cobre Grande Copper Company had been surrendered to Greene and the Greene Consolidated Copper Company, its adversary in litigation, and the officers of the Cobre Grande Copper Company bartered away to said Greene in said contract, as shown by said contract of December 12, 1900, plaintiff and others in like estate were rendered powerless to take any appeal from said judgment or to sue out any writ of error thereon; therefore the original action in this cause was brought for the purpose of having a receiver appointed who might have the power to open up these proceedings for the protection of plaintiff's rights and those of others in like estate.

Denies that the Court in Texas made the findings alleged by defendants; but avers the fact to be, that the action there pending was a possessory action for certain matte claimed to have been taken from the Cobre Grande Copper Company mines, and claimed by the Cobre Grande Copper Company; that the same was tried before a jury and a verdict directed by the Court from which an appeal was taken to the Supreme Court of Texas, which appeal was dismissed by Greene and others in the name of the Cobre Grande Copper Company after the collusive contract of December 12, 1900, by virtue of which Greene obtained control of all the Cobre Grande Copper Company and its officers, and by power of which he became *dominus litis* on both sides of all the cases pending between the Cobre Grande Copper Company

and Greene and the Greene Consolidated Copper Company at the date of filing this action; and by virtue of said dismissal of plaintiff's rights through its trustee, the Cobre Grande Copper Company, were ignored, and the cause not permitted to be heard on appeal.

Admits that the actions pending in the 3d Judicial District of Arizona, and in Texas, and in Mexico, were pending when this action was commenced, wherein the Cobre Grande Copper Company was plaintiff, and Greene and others were defendants; but in connection therewith alleges, that while said causes were pending before said Courts in which judgments had been rendered, that Greene, the Greene Consolidated Copper Company and others acting with them in order to obtain control of both sides of the suit, entered into the contract of December 12, 1900, wherein it was agreed that on Greene obtaining control of the Cobre Grande Company's stock, said causes should be dismissed, and that the officers of the Cobre Grande Copper Company should resign and their places be filled by men of Greene's choosing, and that on and before the dismissal of said actions and judgments rendered therein, plaintiff brought this suit in this Court for the purpose of having a receiver appointed, and the accounting prayed for, the protection of the interests of the minority stockholders; that when said suit was brought Greene and others acting with him, and while said Greene was *dominus litis* on both sides of the actions pending, and by virtue thereof was controlling the litigation on both sides of said causes, they appeared in court, or directed the same to be done, and on their motion, the said litigation which had been instituted by the said Cobre Grande Copper Company against Greene, the Greene Consolidated Copper Company et al., was dismissed or judgment taken

therein at their instance, in which the rights of plaintiff and others in like estate as minority stockholders had no representative to speak for them in the premises, or call the court's attention to the violation of their rights, as was being done by said procedure and dismissal of said causes. Hence plaintiff insists that the same was a fraud upon his rights, a violation of the rules of equity, and an imposition upon the Court, and that therefore, these defendants should not be heard to plead said judgment, thus obtaining as a bar to plaintiff's right of action, because they were parties to the fraud and conspiracy set up in the contract of December 12, 1900.

For cross complaint and reply to new matter set up in defendants answer, plaintiff demurs to said answer for insufficiency, and says that it is true that suit No. 3437, on the docket of the 3d Judicial District in Phoenix, was pending at the time plaintiff's original action herein was filed, wherein the Cobre Grande Copper Company was plaintiff, and Greene et al., defendants, and that it is true that said cause was not determined by the Court; but in connection therewith plaintiff alleges, that while said cause was pending before said District Court, and while the same had been tried, in order to obtain control of both sides of the suit, Greene, the Greene Consolidated Copper Company et al., acting with him, entered into the contract of December 12, 1900, wherein it was agreed that Greene on obtaining control of the Cobre Grande Copper Company stock, the cause should be dismissed; and that notwithstanding said agreement to dismiss, and before the same was done, plaintiff brought suit in this court for the purpose of having a receiver appointed, and accounting prayed for, for the protection of the interests of the minority stockholders; and that when said suit was brought, said

Greene, and others acting with him, instead of dismissing said cause as they had agreed to do, went before the Court at Phoenix and there, while he was *dominus litis* on both sides of the case, that counsel for the Cobre Grande Copper Company and Gage acting with him, and upon their own united motion, judgment was rendered as pleaded by defendants in paragraph 5 of their answer, in which the rights of plaintiff and others in like estate were ignored and violated by the judgment rendered, at which time and place plaintiff and others in like estate as minority stockholders, had no representative, and no one to speak for them in the premises, or call the Court's attention to the violation of their rights, as was being done by said procedure, and insist that the same was a fraud upon plaintiff, and in violation of the rules of equity, and an imposition upon the Court; and, therefore, defendants should not be heard to plead said judgment in bar of plaintiff's right of action herein.

Denies that plaintiff was a party to the contract of December 12, 1900; denies that he ever aided in its execution or approved same or that he ever received any consideration therefor or authorized any person to ratify or approve same for him, or did any act to make himself a party thereto, nor did any minority stockholder now interested in the litigation; on the contrary, avers that he was in New York City while the same was going on and being executed; but that as soon as he learned of the execution of said contract, and that defendants then in litigation opposing the Cobre Grande Copper Company, in which plaintiff's interest was, had obtained a controlling interest in said Cobre Grande Copper Company; that is, when he learned that Greene had obtained 115,000 shares of the stock of said Company, and thereby obtained control of it, and of the liti-

gation, he then declined to become a party to said contract, or to endorse the action of Gage the trustee, and elected to try and protect his rights and save them from the threatened destruction of said contract by making a minority stockholder's action, as he has in this case, and has appealed to the Court for the purpose of seeing that the minority rights of the Cobre Grande Copper Company should be protected.

That he refused to take the small pittance offered by defendants in the then litigation and by Greene who sought to obtain control of same, that he might protect his rights in an independent action.

Denies that any repudiation of said contract, which he made on information of same being executed by Gage as trustee, and as President of the Cobre Grande Copper Company, and Greene as trustee and as President of the Greene Consolidated Copper Company, was a breach of said contract to the injury of Greene or others entering into it, but that same was done for no other reason than to protect his own rights in the Cobre Grande Copper Company; and that said contract itself authorized all who did not endorse the same, to withdraw all interests from the same.

Denies that he ever published far and wide, or at all, in the newspapers throughout the country, or caused the same to be done, the facts set up in his petition as alleged in plaintiff's complaint for intervention. Says it is not true that said actions heretofore brought were not brought in good faith for the purpose of enforcing rights. Says it is not true that his action and other actions brought, were for the purpose of "bearing" the stock of the Greene Consolidated Copper Company and the values thereof, in order that he might purchase same for a less price. Denies that said actions heretofore

brought, or that this action was brought for the purpose of publishing to the public throughout the country, to the knowledge of proposed purchasers of the stock of the Greene Consolidated Copper Company for the purpose of injuring said Company and the defendant Greene, but that this and all other actions heretofore brought, was for the purpose of protecting his rights and those of others in like estate, and to prevent them from being destroyed by the fraudulent conspiracies set up in his original complaint and for no other purpose. Denies that these actions have damaged Greene, the Greene Consolidated Copper Company, or any other person acting in concert with them, or with Greene.

Alleges that each and every action pending at the time this action was brought, was taken charge of and controlled by Greene, the Greene Consolidated Copper Company, and his coadjutors whom he controlled, all of which was because of the power given him by the contract of December 12, 1900, which placed in his hands a majority of the stock of the original Cobre Grande Copper Company. That said suits pending at the date of said contract, and at the date of this action, were controlled in the interest of Greene and the Greene Consolidated Copper Company, because by virtue of said contract of December 12, 1900, Greene became and made himself *dominus litis* on both sides of all the cases then pending, and that their termination in his interest was because of that control, in which plaintiff and others in like estate were not heard or represented, but ignored, and their rights sought to be destroyed; and unless a receiver can be had whereby these fraudulent schemes heretofore related and related in plaintiff's original complaint, and transactions and procedures may be opened up and the rights of minority stockholders pro-

ment whereby all of their stock, to wit, 115,049 shares, was delivered to Gage with the power to vote same at the annual meetings of the stockholders; that after said stock was pooled and while the pooling contract was in force, the stockholders therein represented granted to Gage who held said stock under said pooling contract, the right to dispose of same; and that afterwards on January 5, 1900, Gage as trustee entered into a contract with one Benjamin Orne for the sale of said stock at $2.50 per share, a copy of which contract is attached to the first amended answer herein marked Exhibit "2" and made part of this answer, shown in this record as Defendants' Exhibit "C" Pooling Contract June 5, 1900. (Tr., pages 137-139.)

That said Orne failed to carry out the terms of his option to purchase said stock; that the Cobre Grande Copper Company was without funds and involved in litigation, and for the purpose of carrying on said litigation, on March 30, 1900, Gage, trustee for said stock and with the power to dispose of same, entered into an agreement with L. H. Chalmers, agent, for the sale of 100,100 shares of the Cobre Grande Copper Company stock at $2.50 per share, which contract is attached to the first amended answer marked Exhibit "3" and shown in this record as Defendants' Exhibit "D" Pooling Contract March 30, 1900. (Tr., page 139.)

That in said contract Chalmers was acting as agent for Samuel Untermeyer of New York City, or in case said Untermeyer refused to carry out said option, then such responsible party or parties as might be named by James Shirley. As part of the consideration for this contract, Chalmers, as such agent, agreed to furnish the necessary money for carrying on the litigation. That said contract with Chalmers lapsed on account of his

failure and the failure of those whom he represented to furnish the money to carry on said litigation to purchase said stock.

That afterwards on June 2, 1900, Gage for the purpose of raising funds to carry on said litigation on behalf of said stockholders, entered into a second agreement with Chalmers as agent for the sale of 100,100 shares of the capital stock of said corporation, being the stock then in his hands as trustee aforesaid, and at the price of $250,250.00, and upon the terms and conditions named in said option, a copy of which said option is attached and made part of this answer shown in this record as Defendants' Exhibit Pooling Contract June 2, 1900. (Pages 139-142.)

That on the same day Chalmers made written declaration that he was acting as agent in said contract for William H. Dowe, of New York City, and his representatives; and on the same day said Dowe declared in writing that he was acting for and representing John H. Costello, Axel W. Hallenborg, Henry H. Adams, James Shirley and Senator William F. Deboe. That in consideration for this option said parties purchased about 16,000 shares of the stock of the Cobre Grande Company held by Gage as trustee, and paid therefor $2.50 per share.

That said contract was not complied with on the part of said Chalmers and those whom he represented as agent, but was forfeited and permitted to lapse by the parties whom said Chalmers was representing as agent, among them the said plaintiff Hallenborg.

That during all the time aforesaid the said litigation was in progress. Debts had accumulated against the Cobre Grande Copper Company and were continuing to accumulate. Thereupon the said Gage undertook to

Each note executed by the Cobre Grande Copper Company by Gage, president, and J. Henry Wood, Secretary, all bearing six per cent. interest from date. Some of said notes to the order of Hallenborg, and some to Benjamin Orne or James Shirley and assigned to A. W. Hallenborg; total amount $50,005.

Plaintiff then offered in evidence a copy of the pleadings in action 3437, Cobre Grande Copper Company against Greene and others in the 3d Judicial District of Maricopa County, Arizona, marked Plaintiff's Exhibit (Ex. 2) "C." (Trans., pages 93-104.)

Plaintiff then offered in evidence preliminary injunction in said actions, dated November 29, 1899, marked Plaintiff's Exhibit "D." (Trans., page 111.)

Plaintiff then offered in evidence the agreement of December 12, 1900, between Greene, the Greene Consolidated Copper Company by Greene, its President of the first part, and E. B. Gage, of Prescott, and the Cobre Grande Copper Company, by Gage its President, party of the second part, marked Plaintiff's Exhibit "3." (Trans., page 105.)

Also supplemental contract, same parties, dated December 14, 1900, marked Plaintiff's Exhibit "4." (Trans., page 108.)

Plaintiff then read depositions of *A. W. Hallenborg* filed May 13, 1902, substantially as follows:

My age, 34 years; residence, 107 East 60th Street, New York City. Am a stock broker and member of the firm of Armstrong, Shirmer & Co., doing business at 44 Broadway. Am a creditor of the Cobre Grande Copper Company and was so at the beginning of this action. At that time held notes of the Cobre Grande Company for about $40,000.00, being of the dates and amounts mentioned above. The first two of said notes were assigned

to me by Benjamin Orne for value. Am acquainted with his signature and his signature is endorsed on the back thereof. Since this suit was commenced I have become owner of two other notes of the Cobre Grande Copper Company, being the last two mentioned above. Am acquainted with the signature of Gage and James Shirley. Their signatures appear on the assignments respectively endorsed on said notes. The last two I procured from James Shirley. I took them in payment of money owing me by him. All of these notes are my own property, and are now due and unpaid. The circumstances under which I first became creditor of the Cobre Grande Company were, that in December, 1899, or January, 1900, Benjamin Orne, R. T. McCabe and myself loaned to the Company $40,000 for the purpose of assisting it in its affairs. Afterwards I advanced further moneys to said Company to assist it in the litigation it was carrying on for the recovery of its mines. The notes which I produce were given on account of these advances. For the $40,000 originally advanced, the Cobre Grande Company gave notes for a part, and for the rest turned over some notes it held which had been given to it by other persons. These latter notes, however, amount to only a few thousand dollars, and I believe have since been paid. The notes given by the Company on account of the $40,000 loan, were all made to Orne under an agreement between Orne, McCabe and myself. I am a stockholder of the Cobre Grande Company of upwards of 8,000 shares, and have been since July, 1900. The circumstances under which I became a stockholder were that at that time Gage held as trustee a large amount of stock constituting more than a majority of all the stock of the Company in trust for a large number of stockholders. I was told that some of the smaller stock-

holders wished to realize in their holdings, and that it would be advisable to buy out their stock, and under these circumstances I bought about 8,000 shares and paid for it $2.50 per share, the par value thereof. Have read and am acquainted with the contents of the complaint in this action. My knowledge of the agreement of December 12, 1900, is derived from a copy thereof sent me by Gage. As soon as I learned of the agreement, I employed Atwater & Cruikshank, of New York City, as my attorneys to take steps to prevent the carrying out of the agreement, and through them retained John J. Hawkins, of Prescott, Arizona, as my attorney, to be associated with them, and on their advice sent Mr. Hawkins a proxy of my stock with directions to appear at the stockholders' meeting, of which I had notice, and which had been called, to act on said agreement, and directed him to appear and oppose the agreement. I am informed that he did appear there and oppose the same, and that he also served written notice upon the officers of the Cobre Grande Copper Company warning them not to carry out the agreement. I also had the papers prepared in this suit and had the suit started in Arizona. I also made application to the District Court of the 3d Judicial District for leave to intervene in the suit of the Cobre Grande Copper Company against Greene. The petition to intervene was denied. I took an appeal from said order, which appeal is still pending and undetermined. I used every effort in my power to prevent the carrying out of this agreement, and have acted as promptly and expeditiously as I was able.

Cross-examined:

The consideration for the indebtedness of the Cobre Grande Copper Company to me was money loaned in advance. I purchased 8,000 shares of stock at $2.50

per share from E. B. Gage, and paid the money to him. Certificates were first issued in the name of William H. Dowe, trustee. Mr. Dowe was trustee for Mr. Costello and myself, and afterwards transferred the shares to us according to our interest. At the time I purchased the stock I knew there was a controversy between the Cobre Grande Company and Greene, and that the controversy was in litigation, and I presume I knew that Greene claimed the Cobre Grande Company had forfeited its rights to the mining ground mentioned in its contract with Mitchell. Did not know the particulars as to the Elisa mine, which I understood was bought by the Cobre Grande Company from Greene and payment made in notes not yet due. I did understand in a general way that Greene and his associates had seized all the property of the Cobre Grande Copper Company, and that the Company was endeavoring to regain possession. I loaned the money to the Cobre Grande Copper Company to aid it in its litigation. I was not a volunteer in that litigation because I was applied to by the stockholders of the Cobre Grande Company for assistance. Did not stir up the litigation nor have anything to do with it until after it was commenced and in progress. Did not stimulate the litigation except by advancing money and interesting myself in its progress. Loaned money to the corporation with the expectation of acquiring an interest in the property. Was interested in an option for the purchase of shares of stock in the Company. Hoped and expected in case I purchased this stock under the option to make a profit on it in case I desired to sell. My intention, in case I purchased stock was to hold it as an investment and retain my interest therein. There would have been no object in my loaning to the Company unless I expected to be intersted in the property.

Never visited the mines in controversy; have no knowledge of them based on personal inspection. At the time I first advanced money to the Cobre Grande Company, I became interested in the option for the purchase of shares of stock in that Company, and intended to exercise the same when the Company regained possession of its mines. The $40,000 first advanced was to be used as far as necessary to pay off any installment of the purchase price of the mines which the court might determine to be due. It was the understanding when this advance was made, that $37,500 of the money should be used to pay an installment of the purchase price of the mines at such times as the court should decide it was payable. Did not know there were debts of the Cobre Grande Copper Company which were liens upon the mining ground. At the time I made my first advance to the Company, defendant Greene had been for sometime in possession of the mines. Heard rumors of indebtedness being incurred in running the mines, but as far as I knew they were indebtedness incurred by Greene. Did not embark in said litigation and put up my money as a volunteer for the purpose of stimulating and aiding the litigation, and without any intention of aiding the Cobre Grande Copper Company in paying its debts and meeting its obligations as stated in the contract of purchase between Mitchell and Greene, and the supplemental contract between Cobre Grande Copper Company and Greene for the purchase of said mining ground. I know of the organization known as the Sonora Copper Company. It was organized under the laws of Delaware in April, 1900, as a mining and manufacturing corporation. It was not organized for the purpose of becoming owner of stock in the Cobre Grande Copper Company in order that it might pursue its liti-

gation with Greene and his successors and assigns, and to carry on the controversy without putting up any money or aiding the Cobre Grande Copper Company in complying with its contracts of purchase and procuring the purchase price to be paid the Cobre Grande Copper Company, and to pay off the debts of said Company which were a line upon its ground.

Grant R. Bennett was acting as my attorney about December 12, 1900, for the purpose of protecting my interest in an option for the purchase of stock in the Cobre Grande Company. I understand he was in Phoenix on December 12, 1900. Was in telegraphic communication with him between December 1 and 15, 1900. Have not with me copies of telegrams or letters to or from him during that time, and am advised cannot be compelled to produce them. He was acting as attorney and counsel for me and the communications between us were confidential. I have been informed by Bennett that he was present in Phoenix during the trial of the case of the Cobre Grande Copper Company against Greene and others, and that he had knowledge of the proceedings. At that time he was acting as my personal attorney watching the trial in my interest. I was not a party to the suit but interested in it. I believe I received telegrams from him during the progress of and after the conclusion of the trial, but these telegrams were personal and confidential communications by him to me as attorney to client. I presume I have them now, but am advised that they are privileged, and on that ground decline to produce them. Have none of them with me at present, but presume they are at my house or office. I have never placed my stock in the Cobre Grande Copper Company in the hands of Gage with authority to him to dispose of the same on any terms whatever. Mr.

Gage never had any authority to sell my stock; he never claimed any. I never attempted to revoke any pretended authority to Mr. Gage to sell my stock. As far as I know Mr. Gage never undertook or assumed to sell any of my stock.

Prior to December 12, 1900, I was interested in an option for the purchase of stock of the Cobre Grande Copper Company, or so much of it as was held by E. B. Gage as trustee. The option was at $2.50 a share and extended until ninety days after the Cobre Grande Company got possession of its mines. I didn't take up said option because the Cobre Grande Copper Company had not regained possession of its property. Have not the written option with me. It was not in my name, and I don't think I ever had the original. It was partly in writing and partly oral.

On December 12, 1900, I was at the City of New York. I understand the contract of December 12, 1900, was negotiated and executed in Phoenix, Arizona. I have already stated how I endeavored to prevent the carrying out of that contract. There were letters and telegrams between myself and my attorney, but I do not produce copies of them because they are privileged as I am advised. I have none of such letters or telegrams or copies with me at the present time. I may have written or telegraphed to defendant Gage on the subject.

In November and December, 1900, I was having negotiations in relation to an option on the stock of the Cobre Grande Copper Company held by Gage as trustee. The negotiations were in relation to making changes in an option I already had. Have not with me any letters or telegrams relating to same. Most of them are between my attorney Bennett and myself and were confidential communications. I cannot recollect all the

terms offered or proposed. The final result was that nothing was agreed on. Am at present a stock broker, been engaged in the business sixteen years. I was drawn into the Cobre Grande Copper Company controversy this way: A representative of a majority of the stockholders came to me and stated that the Company needed to raise money to pay its current expenses and to make payment on the purchase price of its mines, and that the person who advanced the money could have an option on the majority of the stock of the Company at $2.50 a share. It was represented to me at the same time, the controversy would be short; that the Company would soon be in possession of its mines; that they were valuable; and that the stock of the Company would be a good investment. With Orne and McCabe I agreed to advance $40,000, of which $37,500, was to be used to pay an installment on the purchase price of the mine whenever necessary to pay it. The balance of $2,500 to be used for current expenses of the Company. At this time it was represented to me that the litigation was practically over. My idea was that by advancing this money I would get stock in the mining corporation which would be a good investment.

Speculations in legal controversies are not usual in the course of business in the line in which I am engaged, and, as far as I know, they are very unusual. Never was concerned in one before; never intended to engage in a speculation in a legal controversy; thought I was getting a good investment in mining property. (Trans., R., pp. 61-64.)

Anderson T. Herd, witness for plaintiff, testified by deposition, substantially as follows:

Age, twenty-nine; residence, 383 Central Park, West New York City; occupation, lawyer. Have read the complaint, and am acquainted with its contents.

In December, 1899, was practicing law in New York City in connection with Dowe and Hartridge. At that time was consulted by Hallenborg, Shirley, Orne and McCabe in regard to their interest in the Cobre Grande Copper Company, and as a result went to Arizona to look into the litigation for them. After making a full investigation, found that the Cobre Grande Copper Company was involved with Greene and others in the following litigations:

1. Suit in the 3d Judicial District of Arizona against Greene and Mitchell and the Pheonix National Bank for an injunction against each of defendants restraining them from taking the deeds that were in escrow with the Phoenix National Bank and turning them over to Greene.

2. A *quo warranto* proceeding by the Attorney General on the relation of some of the officers of the Cobre Grande Copper Company to determine who the proper officers of the Company were, and also asking for an injunction in the same procedings against Greene and his associates from acting as officers and from holding themselves out as such.

3. Found that there had been an injunction suit with relation to a certain meeting held at Bisbee, Arizona, which sought to restrain Greene and his associates from holding a special meeting of the directors of the Company for the purpose of ousting the then officers of the Company and electing Greene and his associates officers thereof.

4. Suit for a receiver of the Cobre Grande Copper Company had been instituted by one Isabella Chase, and was pending at the time I was there.

5. Went from Phoenix to Mexico and found a suit pending there in the District Court at Arispe, Sonora,

in behalf of the Company to recover its property from Greene.

6. In addition to this and growing out of this litigation, a writ of amparo was pending in the Federal Court at Nogales, Sonora.

While I was in Phoenix was employed by the Cobre Grande Copper Company to act as one of its attorneys, and I insisted that the first thing to be done would be to go to Mexico and consult Louis Mendez or some other attorney of equal standing, and follow his advice in regard to the Mexican litigation. This was agreed to and Mr. Chalmers and I went to the City of Mexico for this purpose.

While on that trip we instituted proceedings to recover matte in El Paso, Texas, through attorneys there. By telegraph I instructed Dowe & Hartridge to institute proceedings to recover certain matte that had been shipped to New York by Greene or some of his companies. The nature of these matte suits is as follows: The Cobre Grande Copper Company claimed the sole right to take ores from the mines of which Greene was in possession. Greene or some of his companies deriving their rights from him had extracted ores from the mines and smelted it into matte and shipped the matte to various places, and the Cobre Grande Copper Company where it found it is matte, claimed title to it, and brought actions in the nature of replevin to recover it. Some of such suits were brought at El Paso, some in the City of New York. I continued acting as attorney for the Company to December 12, 1900, and at that time the matte suits were still pending. The suit in the 3d District Court of Arizona by the Cobre Grande Company against Greene, Mitchell and the Phoenix National Bank, and the *quo warranto* proceedings, and the pro-

tected, the plaintiff's rights and those of others in like estate, will have been destroyed without any fault on their part, without their consent or authority or any negligence on their part, because they have always, since the action of Greene and Gage in the contract of December 12, 1900, been seeking for redress and protection of their rights so violated by said contract. (Trans., pp. 35-43.)

THE EVIDENCE.

The cause came on for trial on May 12, 1902, and was continued from day to day until finally decided.

Plaintiff introduced in evidence the stock of the Cobre Grande Copper Company issued to A. W. Hallenborg.

J. Henry Woods sworn and testified on behalf of plaintiff as follows:

I was familiar with the stock books of the Cobre Grande Copper Company up to the time I resigned the secretaryship in April, 1901. At that time J. Edward Addicks was a stockholder to the amount of 5,000 shares. Hallenborg's stock was regularly issued to him. In July, 1899, when I became connected with the Cobre Grande Copper Company, the stockholders were William C. Greene, George Mitchell, Geo. A. Treadwell, J. D. Dort and O. W. Saxhang. In September, 1899, the directors were Greene, Mitchell, Treadwell, Costello and J. Henry Wood. Costello was President, I, Secretary and Treasurer. On November 14, 1899, E. B. Gage was elected President, and the directors were Gage, Wood, Adamson and O'Keefe. Costello became director November, 1900. The capital stock of the Cobre Grande Copper Company consisted of 200,000 shares at $2.50 each, making $500,000. In September, 1899, the Cobre Grande Copper Company was in possession of some nine-

teen or twenty mining claims in the Cananea mountains, a smelter, store building, general camp equipment for running the mines and everything pertaining to the running of a camp of that kind. The mines were being operated by the Cobre Grande Copper Company and were upwards of $1,000,000 in value. About October 11, 1899, the Cobre Grande Copper Company lost possession of the property, and Greene obtained possession. The Cobre Grande Copper Company never has been possessed of that property since. In consequence of that change, a controversy arose between the Company and Greene, suits were instituted by the Cobre Grande Copper Company in the fall of 1899. One of these was commenced at Phoenix by the Cobre Grande Company against Greene and others. On April 3, 1901, there was a meeting of the Board of Directors, five directors resigned, to wit, Gage, Costello, Adamson and O'Keefe and myself. In place of those resigning there was elected Greene, W. H. Barnes, Jerry Millay, L. H. Chalmers, and I think Frank Cox. Barnes is a lawyer and had been counsel for Greene for sometime, and had represented him in the litigation with the Cobre Grande Copper Company. Chalmers is an attorney in Phoenix, and up to that time had been representing the Cobre Grande Copper Company. Millay and Cox were each lawyers and both had been counsel for Greene. On April 3, 1901, Greene was made President, Barnes Treasurer and Alfred Franklin Secretary. The change in management was made to carry out the terms of the contract of December 12, 1900.

Plaintiff here introduced in evidence copy of the minutes of the meeting of the Cobre Grande Copper Company held November 14, 1899, pursuant to call of October 31, 1899; also minutes of the Board of Directors of

November 15, 1899, relative to the election of officers, designated as Plaintiff's Exhibit 1, Transcript, pages 91-92.

Witness continues: In addition to the property in the Cananeas transferred to Greene, the Cobre Grande Company had office furniture in Phoenix and some matte; they had matte en route to the smelter, or at the smelter at that time. Don't know what become of it ultimately. It was placed under attachment, some law proceeding. I think the value must have been some ten or twelve thousand dollars. I refer to the matte which went to El Paso, Texas, which was the subject of the litigation there. The office furniture was turned over to Judge Barnes after the election of new officers in April, 1901. It was worth $150 or $200. With that exception, the Cobre Grande had no assets outside of the property that Greene got possession of. The Cobre Grande Company is not solvent at present. At the time I severed my connection with it, we were paying debts all along up to the time Greene took possession. There were no debts presented to be paid right after that. It was not in possession of assets to meet the claim of Hallenborg; it had no money. I do not know how much money they had after October 14, 1899. At the time my connection with the Company ceased, there were practically no funds on hand.

Cross-examined:

The stockholders of the Cobre Grande Copper Company ratified the contract of December 12, 1900, by a very large majority. Sometime prior to November 14, 1899, there had been two sets of officers claiming to be directors of the Cobre Grande Company, and a suit had been pending to try the question which of the two sets constituted the legal Board of Directors. After Novem-

ber 14, 1899, my recollection is, that the action of the Board then elected was not questioned. At that election the stock voted amounted to 113,340 shares, which was substantially held in trust by Gage. At that time I thought the mining property in question was worth about $50,000,000, because of the ore body in existence there. We had been working it about three months at a profit. I never worked a copper property before. As Secretary and former Treasurer, I did not know of any funds. Mr. Dort turned over to me something like $11,000 I think. My salary was paid clear down to and including October, 1900. I don't know of debts of this Company that were presented up to the time I ceased to be Secretary which were not paid.

Re-direct examination:

The $11,000 was turned over to me in July, 1899. It was used for the operations of the Company—running expenses. I ceased to be Treasurer in November, 1900. At that time there was only a few hundred dollars on hand. I remained Secretary up to April 1; don't know the amount then on hand. Mr. E. B. Knox succeeded me as Treasurer. Gage resigned in April, 1901. I was re-elected Secretary in April and acted as such for a few weeks, possibly five or six. (Trans., 58-60.)

Plaintiff then offered in evidence eight promissory notes of the Cobre Grande Copper Company as follows:

Note $12,000 dated January 19, 1900.
Note $14,175, dated March 6, 1900.
Note $6,000, dated May 1, 1900.
Note $4,000, dated May 23, 1900.
Note $1,905.25, dated June 29, 1900.
Note $1,000, dated August 18, 1900.
Note $4,283, dated March 15, 1900.
Note $7,042, dated May 1, 1900.

attorney now and have not had it since I left Phoenix the last time. It was revoked in writing by telegram by Hallenborg. Received the telegram of revocation I think December 15. At once advised Mr. Gage personally of the revocation; also Mr. Chalmers. I think my recollection is that Mr. Gage advised me that he had received a similar telegram. Was introduced to Hallenborg by Dowe. Understood that Dowe at the time I was in Phoenix during October and a portion of November was attorney and representative of Hallenborg in New York. Wrote a number of letters to Dowe, copies of which are not accessible to me. Don't remember what telegrams I received from Dowe during my first visit to Phoenix, but all telegrams received from me by him or sent by me to him were when we both represented Hallenborg as attorneys. During the time I was in Phoenix consulted with Mr. Gage and Mr. Chalmers very freely and advised with Mr. Costello and his attorney Mr. Herndon. Was not consulted with reference to negotiations leading up to contract between Gage and Greene of December 12. Prior to its execution knew absolutely nothing of its terms except in a general way what I might have learned from Mr. Gage on the Monday before it was executed, when he informed me in substance that he thought he would have to dispose of the holdings to the Greene crowd. He did not tell me that time or any time prior to the execution of the contract, what the terms thereof were or were to be; nor was I asked or evidently expected to be present at any of the conferences or consultations prior to the drafting of that contract, or present at the time it was executed, and unless I am mistaken, was not given a copy of the contract until twelve or twenty-four hours after it had been executed. Think it was

the day after the contract was signed that a copy was given to me by Mr. Gage or Mr. Chalmers, and immediately upon receipt of same I advised Hallenborg of its terms.

During the negotiations and up to the time of the execution of the contract giving Greene control of the Cobre Grande Company, I did not consult with the attorneys or Gage about the contract. Did not approve of same; did not suggest changes and alterations in the proposed contract; did not know of the terms suggested for said contract, and of course no suggestions of mine were incorporated therein, nor did I approve of it after it was drawn. But after it was made and executed, which by its terms seemed to vest a control of the majority of the shares of the Cobre Grande Copper Company in Greene and his associates, it seemed to me that Hallenborg's shares, constituting but a small minority, would be rendered valueless by the conduct of the Company by those in whom the control was vested. I therefore believed it was a wise business proposition for Hallenborg to accept the terms of the contract, take the best money he could get out of it, and so advised him. In other words, I deemed it best for Hallenborg to make the best of what seemed to me a bad condition.

During these negotiations I did not have any conversation with Mr. Barnes concerning the contract. After the negotiations were concluded and the contract executed, I may have said to Mr. Barnes in substance that I believed under the circumstances it might be best for Hallenborg to accept under the terms of the contract and take his money, but I did not state that I approved of the contract and accepted it, and I stated explicitly to every one to whom I spoke, that Mr. Hallen-

borg was opposed to said contract, was determined to resist it, and had not authorized me to accept it. I may have said to Mr. Barnes that I would advise Hallenborg to accept that contract, and as a matter of fact did advise him, but I did not state that I had no doubt he would do so. I did not in substance say the same thing on any occasion in Phoenix to Greene. I did not give Greene or Barnes to understand that the settlement culminating in the contract, met with my approval or that Hallenborg would accept same. I may have said that I thought it might be best for him to accept. (Trans., pages 70-73.)

Plaintiff then offered in evidence Articles of Incorporation of the Cobre Grande Copper Company, dated April 22, 1899, marked Plaintiff's Exhibit Articles. (Trans., page 109.)

Plaintiff then offered in evidence minutes of the meeting of the Directors of the Cobre Grande Copper Company held December 13, 1900, containing motion and resolution ratifying agreement of December 12, 1900. (Trans., page 73.)

Plaintiff then offered in evidence letters from E. B. Gage, trustee, to Axel W. Hallenborg, dated December 17, 1900, marked Plaintiff's Exhibit "7." (Trans., page 110.)

Then the letter of Axel W. Hallenborg to E. B. Gage, dated December 24, 1900, marked Plaintiff's Exhibit "8." (Trans., page 110); and rested.

Defendants then offered in evidence the judgment roll in the case of the Cobre Grande Copper Company vs. William C. Greene et al., No. 3437, in the District Court of the Third Judicial District of Arizona for Maricopa County, marked Defendants Exhibit Judgment Roll. (Trans., page 111.)

Defendants offered in evidence the judgment roll in the action in the Thirty-fourth Judicial District of the State of Texas between the Cobre Grande Copper Company and the Kansas City Smelting and Refining Company et al., No. 3211, marked Defendants Exhibit Texas Judgement Roll. (Trans., page 118.)

Defendants offered in evidence contract or power of attorney to E. B. Gage, dated October 24, 1900, marked Defendants' Exhibit Authorization, Trans., page 136.

E. B. Gage, witness for defendants, sworn, testified, in substance, as follows:

The paper shown to me is the power of attorney handed me by Mr. Grant R. Bennett.

Defendants offer in evidence power of attorney from Axel W. Hallenborg to Grant R. Bennett, dated October 13, 1900, marked Defendants' Exhibit Bennett Power. (Trans., page 137.)

Witness says: I am one of the defendants; don't know plaintiff Hallenborg; never saw him. When the advance of $40,000 was made, there was no understanding that $37,500 of the money should be used to pay an installment of the purchase price of the mines at such times as the Court should decide it was payable. I know of no such understanding. The only written instrument I had showing the status of Hallenborg's stock, was the power of attorney signed Grant R. Bennett, Hallenborg's attorney.

Hallenborg notified me on December 15 by telegram that he revoked Bennet's power of attorney. Don't recollect that I had any correspondence with Hallenborg direct about the pooling contract.

Telegram offered in evidence by defendants as follows:

"New York, New York, Dec. 15.

"E. B. Gage,

"Prescott, A. T.

"I have revoked power of attorney given Grant R. Bennett. (Signed) A. W. Hallenborg."

I was director and president of the Cobre Grande Company at one time. My resignation was acted upon April 3, 1901. I resigned both as director and president, and my resignation was accepted. Since that time have not had any official connection with the Company. Know Costello, Adamson, Wood and O'Keefe; they were also directors and resigned at the same time I did and had no connection with the Company since to my knowledge.

Under the pooling contract, already in evidence, 115,000 shares or thereabouts passed into my hands as trustee. I had the stock in my hands. Met Benjamin Orne once. Had no negotiations with him directly in regard to the matter, but Mr. Herd came out there with a power of attorney from Mr. Orne, I think in January, 1900. An option was given to Orne for the purchase of approximately the same stock. Agreement of January 5, 1900, between Gage, trustee, and Orne shown witness and identified as genuine, and offered in evidence by defendants' counsel, marked Defendants' Exhibit "C" Pooling Contract January 5, 1900. (Trans., pp. 137-8.)

They did not take up the stock under that contract.

Agreement of March 30, 1900, between Gage and Chalmers, shown witness and identified as genuine and offered in evidence by defendants' counsel, marked Defendant's Exhibit "D" Pooling Contract, March 30, 1900. (Trans., p. 139.)

At that time, March 30, 1900, the Cobre Grande Cop-

per Company was in litigation. We needed money to carry on expenses of the litigation. We did not have it. The purpose of that contract with Chalmers was to provide money for that purpose, to conduct the litigation against Greene and the other defendants. They did not take up the stock under that option and it lapsed on account of their failure to comply with the terms.

Witness shown contract dated June 2, 1900, between Gage and Chalmers. This contract was entered into. Marked Pooling Contract, June 2, 1900. (Trans., pp. 139-142.)

There were about 16,000 shares purchased by Hallenborg and Costello under that option as I recollect. The purpose of that contract was to provide money to carry on the litigation. Hallenborg and Costello purchased these shares at that time from some of the stockholders who were restless and dissatisfied. That was a part of the 115,000 shares in my hands under the pooling arrangement we had at that time.

Defendants offer in evidence telegram from Gage to Dort, dated May 31, 1900; telegram Dowe and others to Gage, dated June 1, 1900; telegram Costello to Dort, dated June 1, 1900; also letter from Dowe to Chalmers, dated June 2, 1900; letter from Chalmers to Dowe, dated June 2, 1900. Marked Defendants' Exhibit "E." Telegrams. (Trans., pp. 143-4.)

That agreement also lapsed. It was under that option that the 16,000 shares of the stock that I spoke of was sold to Hallenborg and Costello. The litigation was still going on. The indebtedness of the Company had been increasing. Grant R. Bennett came out to Phoenix and sought to obtain another option, as I understood, for Hallenborg, Costello and others. He then had the power of attorney from Hallenborg to Bennett, already

in evidence. Costello was there in person. There were several contracts discussed and drawn up, but never consummated or signed. Bennett was satisfied with one or two of them, but Costello was not, and failed to sign. These negotiations continued up to the middle of November. Bennett then went east and requested me to hold the matter, if I possibly could, until he could get a consultation with his principal, who would probably return to the Territory with him, and I told him that I would use my best efforts to hold the stock together until he could return. He promised to return about December 1; he returned about December 3, I think, and stated that Hallenborg would follow in a day or two and no action was taken, simply waiting for Hallenborg to appear, and a few days later, between that and the 12th, he notified me that Hallenborg was not coming. I was holding it off because I desired to give Hallenborg an option in preference to anybody else if he desired it. Held off at his suggestion as long as I could. I held the stock under the pooling arrangement up to December 1 and then that expired and gave the people an opportunity who were in the pooling contract to withdraw their stock. Greene's agents were very active in the purchase of outside stock and were making offers to the owners of the pooling stock.

After December 1 they were threatening to revoke their power of attorney, and sell their stock for whatever they could, at the price they could get. There were brokers Orr & Jones buying the stock, they were going to everybody they knew to be owners. I was informed they were buying for Greene and Logan, Greene's attorneys in New York. Told Bennett and Costello that I could not hold these parties together any longer unless they would do something and the situation seemed to be

a desperate one to me. I was informed by my attorney for the Cobre Grande Copper Company, whom I consulted, there was no hope of winning the case of the Cobre Grande Copper Company, the suit tried sometime in October. Asked legal advice. It seemed to me that they would obtain control of the stock of the Company, then if the Judge went against us, the assets of the Company would be practically wiped out. That as a business proposition it was advisable to compromise the case if it could be done. Was informed that the Mexican suit had gone against us; it barred our further proceeding there unless a new suit was brought. I have referred to the suit brought by the Cobre Grande Copper Company against Greene to enjoin the delivery to Greene of the papers deposited in escrow in the Phoenix National Bank.

Had an interview with Greene and his attorney; Judge Herndon and myself on one side, Greene and his attorney on the other. Prior to that I consulted Costello and all the directors, and Costello and Grant R. Bennett were familiar with my views on the matter. The stockholders as far as they were accessible, were fully informed at all times. They advised a comprise and there was no concealment from anybody. All the directors were present when the contract of December 12 was drawn up, and advised it. Bennett was in Phoenix at that time and informed by me what the situation was and what my views were. Don't recollect just what passed between us. Don't recollect that he made any objection to it. As soon as a legal meeting could be held, after the contract of December 12, there was a meeting of the Board of Directors, don't recollect date, they confirmed my action in executing the contract, and afterwards there was a meeting of the stockholders called for

the purpose to confirm the action of the Board of Directors, which was done. I made the first payment of fifty cents per share immediately. It was not accepted by Hallenborg; the other stockholders accepted it. In making the agreement of December 12, 1900, I deemed my action for the best interest of the Cobre Grande Copper Company and all stockholders. There was a payment of $37,500 which fell due on November 26, 1899, under the original contract between Greene and Mitchell which was assigned to the Cobre Grande Copper Company.

Referring to agreement of December 12, 1900, the $25,000 mentioned therein was to pay a note of the Cobre Grande Copper Company which was given for stock which was contributed by different stockholders to the extent of $25,000 to Sandoval & Co. The two amounts of $30,000 mentioned in the contract, was $30,000 in cash and 3,000 shares of stock which they had the privilege of paying in cash for the stock instead of delivering it, making $60,000, was to apply on the notes and debts of the Cobre Grande Copper Company outside of the $25,000. The notes outstanding, so far as we could judge at that time, were approximately, $60,000, including interest, as I understand it. I did not know what the floating indebtedness would be. The notes given to New York parties was the indebtedness discussed and provided for by this $60,000. I did not know at that time what notes Hallenborg held. This was for money that was advanced by New York parties; that was the intention. Hallenborg claimed a portion of it, not all of it. I had provided for all that I could that I could get from Greene. Mr. Herndon said that he thought my salary and expenses should be provided for and Greene voluntarily allowed 5,000 shares of stock for that purpose. The 5,000 shares mentioned there for the use and

benefit of Chalmers, Baker and Bennett, and Herndon & Norris, was for their services as attorneys in the Cobre Grande case. I don't know how many suits were pending. It was for their services in all these matters. There was an understanding in the meeting that if the notes that were held in New York were not presented, that I should turn that $60,000 over to the Treasurer of the Cobre Grande Copper Company, and I did so, and got a receipt from the Company for that amount, which I produce.

Receipt read in evidence, April 3, 1901. (Trans., page 79, Fols. 119-120.)

The unsigned agreement dated November, 1900, shown witness.

He says, I don't say that I can positively identify that paper; it was similar to the one submitted to me, but there is nothing by which I can identify it. The one submitted to me was the same in substance and form marked Defendants' X Pooling Contract unexecuted. (Trans. of Rec., page 144.)

I think I opened the negotiations which led up to the contract of December 12; made the best terms I could. Negotiations were continued a day or two. I represented to Mr. Greene that the lawyers were claiming $50,000 for their services and wanted him to pay that. I suppose that was a debt due them for their services. They had rendered services and it was hard to fix lawyers fees. They had not been paid. I think Greene said he would buy all the outstanding stock that would be offered at $2.50, the same price he paid me. I paid $60,000 to the Treasurer of the Cobre Grande Copper Company and paid another debt of the Company of $25,000. At that time I had paid out some money for the Cobre Grande Copper Company, quite a considerable amount; don't recollect how much.

ceedings in Mexico to regain possession of the property, were all still pending. My recollection is, that the action for receivership brought by Isabella Chase had been dismissed before December 12, 1900. In regard to the writ of Amparo in Mexico, which was taken by Greene in the Federal Court, I understand that prior to December 12, 1900, the Amparo proceedings had been heard by the Federal Court and the order or decree given by the District Court of Sonora, directing the return of the mines to the Cobre Grande Company, had been set aside on the ground of failure to give proper notice to Greene of the proceedings, and the proceedings had been remanded to the District Court with directions to be reheard upon proper notice to Greene.

Cross-examination:

Became attorney for the Cobre Grande Copper Company in the forepart of January, 1900. Said Company has never authorized me, as its attorney, to divulge or testify as to what I did for that Company as its attorney or as to information acquired by me as its attorney. In my answer to direct interrogatories I have not disclosed any confidential communications between myself and said Company; have only spoken of suits and proceedings which were matters of record, and most of which were commenced and of which I acquired knowledge before I became attorney for the Company. Have not volunteered to testify as against the Cobre Grande Company as to matters which came to my knowledge as such attorney; am being examined as a witness under a commission issued from the Arizona Court, and I have testified only as to such matters as to which I understand am compelled to testify. (Trans., Rec., pages 67-69.)

Plaintiff then read in evidence the promissory note

for $23,000 made by Costello of date December 16, 1899. (Trans., p. 69.)

It was admitted that said note was returned to Costello by the Cobre Grande Copper Company subsequent to December 12, 1900. (Trans., page 70.)

Plaintiff then read in evidence the depositions of *Grant R. Bennett*, witness for plaintiff, taken April 25, 1902, in substance as follows:

Age, thirty-eight; residence, New York City, occupation, lawyer. My knowledge of the agreement has been obtained by reading it after it was executed. I took no part in the conference with reference to it and which led up to its making. Was not present when signed or delivered nor at any of the meetings. Never in any way, by writing or verbally, gave my or the consent of Hallenborg whom I represented, to that contract, or my approval. The only conversation I had with any one immediately prior to the consummation of the contract was a general one with Mr. Gage, the purport of which was that unless our clients could buy all of this stock which was called Jerome stock, and which had been in the pooling agreement and previous option contract, that he apprehended that he would be compelled to make terms with Greene. Without stating accurately, my recollection is that my conversation with Gage was on Monday of the week in which the contract was executed. All that week at various times upon receipt of telegrams from Hallenborg I advised particularly with Mr. Gage, stating to him that Hallenborg would not consent to the contract and on the contrary desired to resist and prevent its consummation every way possible, and that he had so instructed me by telegram.

Was present in Phoenix, representing Hallenborg as attorney, for a period during the months of October,

November and December, 1900, except a short time when I was in New York. My principal purpose in going there was to obtain the contract for Hallenborg and his associates of a majority of the shares of the Cobre Grande Copper Company. Costello was personally present during much of the time. It is a fact that various forms and memoranda were drawn up, typewritten, and discussed looking to securing the option above mentioned, and some of them were in substantial accordance with my instructions from Hallenborg. Hallenborg did in response to my telegram, wire me his acceptance of a certain contract and placed in the Phoenix Bank his proportion of the money to be paid under the terms of such contract and which would give him and his associates control of a majority of such stock. There were various complications in getting the different parties together which delayed the execution of the contract until my return to New York, and when I came back to Phoenix I found that conditions had changed, and that it would require considerable more immediate cash to secure the contract than at first. Forms of other contracts were drawn. Their terms were generally acceptable to Mr. Gage, but were not ratified by the Cobre Grande Copper Company. I think their terms were generally acceptable to Hallenborg. Cannot swear whether these contracts were satisfactory to Costello or not, he was on the ground and represented by attorneys. It is a fact that these negotiations were kept up to the first week of December, 1900. Cannot say whether nothing resulted therefrom.

My presence in Arizona for Hallenborg was for the general purpose of getting control of the Cobre Grande Copper Company and a majority of shares of its stock in order to conduct the litigation and end it and make all the shares of stock profitable to the stockholders.

Have examined the pooling contract of November, 1900; am unable to state as a matter of law that Hallenborg and Costello were the persons interested therein. Don't know whether Chalmers was the agent for Hallenborg and Costello or not. Am very certain that Hallenborg was dissatisfied with the fact that Greene had apparently secured the management of the Cobre Grande Copper Company, because he expected thereby to lose all the money he had invested in the Company. Don't know the reason for the institution of these proceedings. This unexecuted contract of November, 1900, appears to be one of many of those forms of contract drawn by various persons or their attorneys for the purpose of vesting in Hallenborg and associates control of the Cobre Grande Copper Company. Am quite certain I did not draw this contract; don't remember its terms; can't state that they were satisfactory to Hallenborg, because I did not advise him of the terms of this contract. Don't know whether Costello objected to it or not. My recollection was that I was in Phoenix on the 22d of October, 1900; that I arrived there on the 19th of October and remained until about November 17. Was present during most of said trial. Believe a motion was made to admit me to practice in that Court. Did not take any active part in the trial. Did confer with the attorneys. So far as I acted in the trial, I represented plaintiff by courtesy of plaintiff's attorneys. Otherwise while at Phoenix I represented Mr. Hallenborg. I am the same Grant R. Bennett who signed the pooling contract placing 115,000 shares in the hands of Mr. Gage, and the signature of Hallenborg to that contract was signed by me. All the time I was in Phoenix until December 15, I was acting under a written power of attorney; have not that power of

That was the first vote for salary attached to the president's office.

Re-direct examination:

I didn't make any application for money to carry on these suits to the New York stockholders; they made the application; they furnished the money and instructed me to go on with the suits. (Tr. of Rec., pages 75 to 84.)

L. H. Chalmers, for defendant, testified, in substance, as follows:

I know Anderson T. Herd; he and I employed attorneys in El Paso to bring the suit there, the record of which has been introduced in evidence. He was representing Benjamin Orne, whose name appears with Hallenborg in some of these options. It was part of the consideration for the options to purchase stock that a debt of $40,000 that Hallenborg now claims was to be released. I went to New York with the object of raising money to carry on this litigation; did all I could. We would have sold the stock at $1.00 a share many times. The highest price I found it possible to sell the stock for was $2.50 a share. Hallenborg offered to take it at the same rate; take an option upon it. He and Costello bought 16,000 shares at that figure. There was no other bidder who offered to take it at $2.50 a share. Costello had an option in July at $2.50 and bought considerable of the stock at that time. I drew the Articles of Incorporation of the Cobre Grande Copper Company, and have been acquainted with it since its inception. Know the services rendered by the lawyers. Practically all the time of Herndon & Norris and myself, or a large portion of it, was taken up the latter part of 1898, 1899 and 1900 to the time the contract was made. We brought from ten to a dozen law

suits and oversaw the litigation in Mexico. I took frequent trips to the City of Mexico, to El Paso, to Nogales, Hermosillo and one to New York. I attended to all sorts of motions in these cases. We were overseeing the whole litigation in Arizona in several of its courts, in Maricopa and Cochise counties, also motions in Pima County, trouble in Nogales, transactions out of court. It took me nearly all my time for six or eight months to keep Mr. Wood out of jail alone, and overseeing the Mexican litigation, employing lawyers—my whole time was practically taken up. I practically abandoned my office from the latter part of 1898 until the settlement. The time of Baker & Bennett was more taken up in court matters. I would telegraph Baker & Bennett, or Herndon, to go here and there and sent them all over the country. Mr. Herndon is generally considered a good man. When this matter of compromise came up Mr. Gage spoke to me about it, and I told him that I had expected to get as much as $50,000 out of this litigation myself. We talked it over and concluded that we would hold out for $50,000 and try to collect it. That was an extremely reasonable compensation. I was not present at the time of the decision of Judge Street. At the time of the submission to him for decision, I was the attorney for the Phoenix National Bank, as well as for the Cobre Grande Copper Company. I approached Judge Barnes in regard to the submission of the case. I told him that the bank was enjoined from passing over the escrow papers; that Hallenborg had brought a suit in Prescott claiming that the contract of December 12 was fraudulent, and that there had been demands upon the bank for the papers by Greene and Mitchell and different parties, and we didn't know what to do with those papers, and I asked Judge Barnes if the case

ought not to be submitted and a decision rendered, and he agreed with me. Went into the court room at Phoenix and announced to the judge who was on the bench that the attorneys for both sides of the case desired that it be submitted. This is the last I heard of it until it was decided. Judge Barnes wasn't in court at that time. In making up my estimate for the services of myself and associate counsel, I took into consideration not only the time which was employed in attending to the litigation and outside matters, but the amount and questions involved and the value of the property. I recall that Edwards & Petticolas were attorneys in El Paso for the Company, and were paid by the Company.

Cross-examination:

It was after December 12, 1900, I went into court at Phoenix and asked that the case be decided. It was after Greene had become president of both parties and after the time the Directors of the Cobre Grande Company were elected friendly to him. Don't remember the date when the case was decided. My recollection is, that it was four or five days after it was submitted before the decision was rendered. The date of the decision was not law day—Saturday. Mr. Jamison was there when the case was submitted. The record shows that the decision was rendered on April 15, 1901. I have stated all that I know with reference to the submission of the case to Judge Street. Was present and took part in the trial between the Cobre Grande Copper Company and Greene and others in Phoenix in October, 1900. Mr. Jamison took a very active part in that trial—examined the witnesses. He and I were partners at that time. So far as my office was concerned, he took charge of the preparation of the trial, was quite familiar with the case,

was very sanguine of success, so was I. I believed the action well brought, so did the others. All the suits referred to were in relation to the controversy of the Cobre Grande Company in Sonora. The two parties were the Cobre Grande Copper Company on one side and Greene and Mitchell on the other. The controversies all arose over the struggle of the Cobre Grande Copper Company to regain possession of the property and the product of the mines, matte and so on. The amount involved in the suit in Maricopa County was absolutely nothing, it was merely the possession of the escrow papers. We thought the mine was of great value, and that the winning of that suit was a preliminary step to get a good standing in Mexico. We could take the deeds to Mexico and put them on record and bring our action there. Mr. Barnes was counsel for Greene and Mitchell, and I spoke to him about the submission five or six days before, say the 3d, 4th or 5th of April. Had no consultation with any one on the subject. Considered myself in absolute command of the Cobre Grande litigation. Did not state anything to Judge Street at that time. I think the cause had remained on submission before him all the time previous to that. The agreement of December 12 required the action be dismissed. That was not done, and I had no consultation with any one with reference to it. Judge Barnes prepared and sent the judgment over to me for my approval. I marked it approved according to the practice here. The judgment did'nt come into my hands until after the decision had been announced from the bench. Suppose it was filed the 15th of April. My recollection is he sent the judgment over to Tucson where his office is.

In the present action I appear of record for the Cobre Grande Copper Company and have taken part in the

trial and have resisted plaintiff's suit. Don't know who is president; think Scott White is Secretary. Have appeared here principally by direction of E. B. Gage to look after his interest. In doing so I have seen fit to appear for the Cobre Grande Copper Company. None of the defenses were put in at his request. It was Judge Barnes who asked me to appear for the Cobre Grande Copper Company in this case. At that time he was a director of the Company. We discussed the situation in Mr. Herndon's office the other day. Barnes is representing Greene on this trial and has been the leading counsel on his behalf. Don't know how much was paid by the Cobre Grande Copper Company to the different counsel during the litigations. I drew out sums of money and paid them out to counsel myself; have no doubt that $20,000 was paid, we had counsel all over the United States and Mexico. Think the Arizona counsel got somewhere between three and five thousand dollars. Drew some twelve or fifteen thousand dollars which was used for expenses of all kinds and attorneys fees in El Paso, New York, and different places. The action was brought and money disbursed under my advice and that of Herndon and Baker & Bennett. The litigation was directed from here by Wood and myself. The suits were brought in good faith, the money paid in good faith, and I think the suits were necessary.

Re-direct examination:

Mr. Herndon and Baker & Bennett were against the theory and policy of that litigation from the start. I fought them all the time continually. They thought the chances of winning were absolutely nil on account of the failure of the Cobre Grande Company to pay a certain $37,500 on the 26th of November, 1899. I contended that we could win notwithstanding that. We

claimed that Mr. Greene had wrongfully ousted us from the possession of the property in Mexico, and thereby deprived all of an opportunity of making money that we thought we were going to make in Mexico. (Trans., 84-87.)

Norton Chase, on behalf of defendants, testified, in substance, as follows:

That the Greene Consolidated Copper Company had twenty-one directors at the time the contract was made with Mr. Gage in December, 1900, and about fifteen hundred or two thousand stockholders located over the United States and many parts of Europe. (Trans. Rec., 87.)

W. C. Greene, witness for defendants, testified, in substance, as follows:

I know J. Edward Addicks, intervenor in this case. Have met him since the contract of December 12, 1900, and offered him $3.00 a share for his stock in the Cobre Grande Copper Company. He said I don't care about selling my stock, it is a pretty good investment, I think we will make a success of the Cobre Grande Copper Company. (Trans. Rec., 87.)

W. C. Greene, called for plaintiff, testified:

The par value of the Greene Consolidated Copper Company stock is $10.00 per share. I think it is selling on the market to-day for $26.25. It has gone as high as $50.00 and as low as $2.00. In February, 1901, we offered the stock to the public at $5.00 per share and paid 20 per cent commission for selling. The capital stock of the Company was then $5,000,000, it is now $6,000,000. (Tr. Rec., page 87.)

W. H. Barnes, for defendants, testified, in substance, as follows:

I was elected Secretary of the Cobre Grande Copper

Company the 13th or 14th of April, 1901. Mr. Gage turned over $60,000 to me as Treasurer at about that time; there was some paid out, don't remember the payments. Turned over to the Treasurer about $50,000. Am satisfied that there is that much in the treasury now. Hallenborg never demanded payment while I was Treasurer. I was present part of the time the negotiations between Gage and Greene which resulted in the contract of December 12, 1900, didn't hear it all. Case tried before Judge Street at Phoenix; was submitted after hearing all the evidence and final argument, and the Court announced that it would have the stenographer write out as much of the testimony as we desired and subsequently render its decision.

After the contract of December 12, 1900, was made, I did not go into court myself, but understood the order of submission was set aside. After the final payment, met Mr. Chalmers in Phoenix one day; he said that the bank was interested in getting rid of the escrow papers, then he spoke about this suit. That was the first time I had heard of it. My clients had not been served, and he said Hallenborg was complaining that the agreement was to dismiss that law suit in Phoenix and other law suits. One of us said that if he complains of dismissing all suits we will resubmit them and have them decided. We concurred in that. My recollection, is that Judge Street was holding court in Yuma at that time, and we sat down and wrote a little paper of three lines. It was agreed that the case should be decided and we hoped at the earliest convenience of the court, and both signed. My recollection is, that it was sent to Yuma, and the next thing I heard was that the Judge had decided in our favor. I wrote out the judgment in accordance with the decision as I found it to be and sent

it to Mr. Chalmers, attorney on the other side, in accordance with our practice, that he might o. k. it and send it to the Judge.

Counsel for Greene or the Greene Consolidated Copper Company never went into the court or consented to the entry of any judgment in that case.

The Cobre Grande stock which was bought from Gage under the agreement of December 12, was paid for with money of the Greene Consolidated Copper Company and the stock delivered to the Treasurer of that Company.

Cross-examination:

The Greene Consolidated Copper Company is a corporation of West Virginia; W. C. Greene is president. It took possession of this mining property in Sonora subject to all the rights and equities of the Cobre Grande Copper Company, and a great deal of other property. (Tr., page 88.)

L. H. Chalmers recalled for defendant.

I want to make a correction. I think I stated on my examination that when I was talking with Judge Barnes that this suit had been commenced in Prescott by Hallenborg; whether it had been commenced at that time I don't know. What I meant to say was, that I knew Hallenborg was objecting to the whole situation. I now remember sending the little memoranda made by myself and Judge Barnes to Yuma, and I merely announced it in open court after he returned. It may be that the Phoenix National Bank had been served with an application for an injunction in the present suit before the resubmission in Phoenix, but I don't remember one way or the other. (Tr., pages 88-89.)

J. C. Herndon, called for defendants, testified, in substance, as follows:

With reference to the 5,000 shares of stock that went

Cross-examination:

Nothing came of the contracts for options for the sale of stock. The first one that took effect was that I made with Mr. Greene. At that time was negotiating in both capacities. The new Board of Directors of the Cobre Grande Copper Company were not all present when we had the preliminary meeting in consulting about that matter. They were present at the time of the execution of the contract. Can't recollect who of the stockholders were present at the ratification. Mr. Bennett was there representing Mr. Hallenborg; don't know whether he read the contract before it was executed or not. He was not present at the negotiations between me and Greene. I called his attention to the provisions of the contract; handed him a copy of the agreement. He was not present at the stockholders meeting when the approval was adopted, nor at the meeting of the Board of Directors that ratified it. Judge Hawkins was present. The first I heard of Mr. Hallenborg was the sending of the check; that was the first information that he acquiesced in the terms of the contract. I think I had telegrams from Hallenborg during October, but don't recollect what they were; they did not bear upon the question of the contract. Bennett said that Hallenborg was not satisfied with the position he had taken in this matter and had revoked his power of attorney. It was afterwards I got that telegram repeated to me from Prescott; I was in Phoenix. Mr. Hallenborg's attorney was present at the meeting ratifying this contract and protested. I was president of the Cobre Grande Copper Company on the 25th of November, 1899, when the suit was brought by the Company against Greene in the Third District. I did not think, personally, that we had any

grounds to stand on. Hallenborg was informed of all the conditions of the case. I obtained and used money for the purpose of conducting the litigation. The $25,000 I received was for the purpose of paying an obligation of the Company. It was payable to me as trustee for certain stockholders of the Cobre Grande Copper Company, whose name I don't recollect. The money was paid to them. I didn't make any effort to apply the $60,000 to the payment of the New York notes. The notes were sent out to me and then withdrawn. I don't think any notices were sent to any of the creditors to the effect that the money was collected for the payment of the notes they held. I had not notified any of them except possibly Mr. Shirley; he sent his notes to me and afterwards withdrew them. At the meeting of April 3, 1901, when I resigned, I think all the directors were present, Judge Herndon, Mr. Chalmers, Mr. Greene, and I don't know who else. The purpose of the meeting was to act upon the resignation of the officers of the Company in obedience to the contract of December 12. I resigned and Mr. Greene was elected president; he was also president at that time of the Greene Consolidated Copper Company, the adversary of the Cobre Copper Company in the litigation, and at that time the suits were pending and undetermined. I knew that Mr. Greene was president of the other Company, and that he was defendant in that action. Mr. E. B. Knox was treasurer of the Cobre Grande Copper Company at that time, and he resigned and W. H. Barnes was elected in his place. I knew that Barnes was counsel for Mr. Greene; I knew at the time that these new directors were mainly counsel for Mr. Greene, who was defendant in the case which we had been prosecuting. I knew the new board was associated with Mr. Greene as counsel after they were elect-

ed. I returned Mr. Hallenborg's stock to his attorney, Judge Hawkins, after I had sent him the check and he returned it to me in December, some little time after; I should say it was longer than a few days; think within a few weeks.

The action in the Third District in Phoenix was begun November 25, 1899, as I recollect. I don't recollect the original counsel employed for plaintiff in that case. Herndon & Norris, Baker & Bennett and L. H. Chalmers were in that case afterwards for plaintiff. Those are the gentlemen to whom those 5,000 shares of stock was to be taken as lawyers' fees for conducting the legal business of the Company up to practically the time that it passed into the hands of Mr. Greene. I could not tell just when each one started in. My recollection is, that it was at the beginning of this suit in the Third District. They conducted the litigation in Mexico, El Paso and other places. Mr. Chalmers went to Mexico; I think Baker went to Mexico once or twice; it was on this litigation with reference to the Cobre Grande property in Cananea. There was litigation in Mexico. The litigation in El Paso was with reference to the copper matte. Something was paid the attorneys before this; can't say how much. No bill was presented to me in writing. They told me that they claimed that amount for their services. No statement was made by the Treasurer of how much had been paid out; think it was over $1,000; I don't know whether it was over $5,000; I don't think it was over $10,000; it was between $1,000 and $10,000. I don't know to whom it was paid, or whether all three. I didn't investigate at that time. They told me what their claim would be and I claimed that much of Mr. Greene. He paid the attorneys in the case, and they

claimed so much, and he accepted to 5,000 shares of stock. I can't say what their services were. Was not present at the trial in Phoenix. Think Mr. Jamison made the argument in the case. I don't know who examined the witnesses. When I brought that action I don't know whether I consulted any of those lawyers about it; I presume I directed them to bring the action, don't recollect. Think a resolution was passed directing the action to be brought, but don't recollect. I presume I consulted with the lawyers for the plaintiff, the attorneys for the Cobre Grande Copper Company at the time the action was brought. They advised me that they had a good cause of action at the time, and I considered it my duty, as president of the Company, to bring the action. I understood at that time that the action involved practically all the property of the Company. The case was tried some time in October, 1900, before Judge Street; don't know how long the trial took. Between October and the 12th of December there had been no decision rendered by Judge Street in that case, and I had no previous communication as to what his decision would be, and no means of getting any. My attorneys advised me that they didn't think that there was any possibility of winning the case. Judge Herndon told me that when he came to Prescott after the trial, and I was so informed by Baker & Bennett practically about the same time or soon after. Don't recollect how soon after. They so advised me in December, soon after Judge Herndon spoke to me about it. They said they thought that they had not made a case we could win under. I don't know that the points were given to me; I think it was because they hadn't shown sufficient cause why the $37,500 was not paid. Mr. Jamison always advised that he would win the case. I understand that he took a prominent

part in it. He did not advise the settlement of December 12. The object of giving the options in evidence was, in the first place, to get funds to conduct the litigation and try to get possession of the property in Mexico, and money was furnished for that purpose in New York. Mr. Orne, as I understood, furnished the first $40,000. I never heard of Mr. Hallenborg until along the summer some time; was informed that he had an interest in the option that was given to Mr. Chalmers; I think the second option. Don't recollect that Mr. Orne was connected with that. It was an option to New York people to purchase the stock of the Cobre Grande Copper Company. I had talked with Grant R. Bennett at Phoenix on that subject, and understood from him that he represented Hallenborg, who wanted to get control of the stock and wanted another option on it with the idea of getting control of the majority of the stock, and that Mr. Bennett was there representing him for that purpose. The attorneys in New York representing the Cobre Grande Copper Company in the copper matte litigation were Dowe & Hartridge, and subsequently to December 12 I removed them as attorneys for the Cobre Grande Company, and appointed in their place either Logan, Demond or Harby; I think Mr. Harby was the one appointed. Don't know whether Mr. Harby, acting afterwards, was a member of the firm of Logan, Demond & Harby or not. It was Harby, or that firm. Mr. Logan is the gentleman I mentioned as purchasing stock for Mr. Greene. At the stockholders' meeting Judge Hawkins, of Prescott, protested against the proceedings for Mr. Hallenborg. I turned over the $60,000 to Mr. Barnes in a check on the Consolidated National Bank of Tucson. That was the same Mr. Barnes that was attorney for Mr. Greene. Mr. Costello in the meeting wanted

to know what would be done with that $60,000, provided the notes were not presented, and it was discussed and considered as an asset of the Cobre Grande Copper Company, and I said that I would turn it over to the treasurer of the Company; the money did not belong to me. I did not have in my mind just at that time how the notes were divided, who held them, but I had an approximate idea of about how much was due in New York for advances made for which notes had been given, and I endeavored to cover as near as I could; I tried to get all I could. I did not then know that Judge Hawkins represented Mr. Hallenborg. I don't recollect that I ever notified any of the New York creditors. I can't state why it was not stated in the agreement of December 12, 1900, that there was a fund for the creditors. I didn't draw the contract. I am not sure who the attorneys were who drew it. Judge Herndon and Judge Barnes I think were present. The $25,000 was applied to some of the creditors of the Cobre Grande Copper Company to the people who advanced out of their holdings stock to the extent of 10,000 shares, which was given to Sandoval for his services in Mexico. I have not the list with me. There was Dort and Adamson and a good many of them who contributed a small portion of their holdings—quite a good many. I don't know of the application of any particular sum towards my salary out of this money obtained under the agreement of December 12. I retained what I had; the contract was 5,000 shares of stock. They afterwards paid me $50,000 in lieu of that. I don't know how much of it was for salary; might call it all salary or expenses or anything else, salary and expenses—don't recollect how it was divided. There was a salary of $15,000 a year voted me at one of the meetings; I think that was November, 1900.

of said stock at $2.50 per share. That Orne failed to purchase the stock under said option.

That Gage subsequently, as trustee, entered into various option contracts with various parties, all of which fell through; and that afterwards Hallenborg and Costello undertook to procure an option from Gage to purchase said stock at $2.50 per share. That various contracts were drawn and submitted, but were not acted upon.

That about the first week in December, 1900, Gage opened negotiations with Greene to sell him the stock, and that Greene offered him a better price than anybody else had ever offered.

That Gage consulted the directors and a large majority of the stockholders of the Cobre Grande Company, and they urged him to enter into the contract with Greene for the sale of said stock. That the stock represented by Gage comprised the entire stock of the Cobre Grande Company, including Hallenborg's 8,000 shares, except that owned by Greene and his associates, and about 6,500 shares owned by other parties. Thereupon Gage took the matter up with Greene, and on December 12, 1900, entered into the contract of that date mentioned in plaintiff's complaint.

That after the contract was made a meeting of the Board of Directors and a meeting of the stockholders of the Cobre Grande Company was held, and said contract was ratified in its entirety by the directors and by a majority vote of the stockholders; Hallenborg being present at the stockholders' meeting and protesting against the ratification. Immediately upon the execution of said contract, Greene paid fifty cents per share for each of the shares represented in the pool, including fifty cents a share, then held by Hallenborg. Afterwards Greene complied with his contract and paid up

the full purchase price for the stock as agreed upon in the contract of December 12, 1900, and said stock was delivered to him and the Greene Consolidated Copper Company in accordance with said contract of December 12, 1900.

That all of the stockholders accepted the money so paid to Gage and ratified said contract, except Hallenborg, who returned the money sent him and declined to be bound by the contract.

That the contract of December 12, 1900, was entered into by Gage in good faith with the full knowledge and consent of the directors of the Cobre Grande Copper Company, and upon the advice of counsel of the Cobre Grande Copper Company that the Company could not successfully maintain its suit No. 3437, and with the belief on his part that said contract was for the best interest of said Company and its stockholders.

That there was no agreement between Gage or any other persons whereby the directors, Adamson, Wood and O'Keefe, or any of them, were to derive, or did derive, any benefit, except such benefit as they derived from the sale of their stock.

That the suits mentioned in plaintiff's complaint as pending in New York are still pending; that all other suits mentioned in plaintiff's complaint were dismissed or otherwise disposed of by final judgment prior to this action; that the $25,000 mentioned in the contract of December 12, 1900, was for the purpose of discharging certain outstanding notes due by the Cobre Grande Company to its creditors; that the $30,000 cash mentioned in said contract was for the purpose and intended by the parties to be turned into the treasury of the Cobre Grande Company to pay its debts; that the 3,000 shares of the capital stock of the Greene Consolidated Copper Company mentioned in said contract, or

the $30,000 which Greene had a right to pay in lieu thereof, together with the $30,000 last above mentioned, was intended by the parties to be paid into the treasury of the Cobre Grande Copper Company for the purpose of paying the Company's indebtedness outside of the $25,000, a portion of which indebtedness Hallenborg claims in this action.

That the 5,000 shares of the Greene Consolidated Copper Company mentioned in said contract agreed to be paid to Gage was intended by all the parties as compensation to him for services rendered as president of the Cobre Grande Copper Company, and as compensation for his time, labor, trouble and attention given to the Company's business, and for money advanced to and for said Company, and expenses paid in attending to the affairs of said Company and in connection therewith.

That the 5,000 shares of stock of the Greene Consolidated Copper Company mentioned in said contract as agreed to be paid to Chalmers, Baker & Bennett, and Herndon & Norris, attorneys for the Cobre Grande Company, was intended to be paid as compensation for their services rendered to the Company in various litigations.

That the $25,000 first above mentioned was paid by Greene and used in paying said creditors.

That the $30,000 first mentioned above was paid by Greene to Gage and by him turned into the treasury of the Cobre Grande Copper Company.

That the 3,000 shares of the capital stock of the Greene Consolidated Copper Company above mentioned, in lieu of which Greene had the option of paying $30,000, was paid in cash by Greene to Gage and by him paid into the treasury of the Cobre Grande Copper Company.

That the 5,000 shares which was intended as compensation to Gage was paid in cash, to wit: the sum of $50,000.

That the 5,000 shares of the Greene Consolidated stock mentioned in said contract as being intended to be paid to Chalmers, Baker & Bennett, and Herndon & Norris, $50,000, was paid in cash in lieu thereof, and said cash was distributed among said attorneys, and the proof tends to show that their services were reasonably worth that amount, with no evidence to the contrary.

That the note of Costello mentioned in the contract of December 12, 1900, was conditioned upon the Cobre Grande Copper Company obtaining possession of its property in Mexico, said note was not to be paid until ninety days after such recovery of possession, and was turned over to Costello, as provided by the terms of said contract.

That the only property now in possession of the Cobre Grande Company within the jurisdiction of this court is a certain sum of money held by the treasurer of the Company, which was paid to him as a part of the proceeds of the agreement of December 12, 1900.

That the temporary restraining order granted in this action enjoining defendants from carrying out the terms and provisions of the contract of December 12, 1900, and dismissing any and all actions then pending in behalf of the Cobre Grande Company, and enjoining defendant Phoenix National Bank from delivering up any of the papers and documents held by it in escrow evidencing the title held by the Cobre Grande Copper Company to the mining property described in the complaint was modified, and the part of it enjoining the Phoenix National Bank was dissolved upon the ground that the District Court of Maricopa County had ren-

dered its decision in the suit of the Cobre Grande Copper Company against Greene and others adversely to said Cobre Grande Copper Company, and that as part of the judgment of said Court, the Phoenix National Bank was commanded to deliver up said papers and documents to Greene, and that as this case now stands there is nothing before the Court except an application for the appointment of a receiver. (Trans., pages 193 to 200.)

ARGUMENT.

From the above findings it is apparent that all of the suits mentioned in plaintiff's complaint, except the New York suit, had been dismissed or disposed of by final judgment before this action was commenced, and that that suit is being prosecuted by plaintiff Hallenborg.

That all of the defendants who were officers or directors of the Cobre Grande Copper Company, and whom plaintiff prays may be compelled to prosecute said actions, had ceased to be officers, directors or agents at the time the action was commenced.

That the Phoenix National Bank had delivered the papers and documents constituting and evidencing the title to the property in controversy to Greene or the Greene Consolidated Copper Company before this action was commenced, under the command of the District Court of Maricopa County in cause No. 3437, and there was no attempt toward an account.

It is apparent, therefore, that the Court could not comply with the prayer of plaintiff's complaint as to these matters, and that there was really nothing before the court except an application for the appointment of a receiver (as the court found), with authority to bring

an action in the courts of Sonora, Mexico, to recover the property which it claims belongs to the Cobre Grande Copper Company under the option executed by Greene to Mitchell in November, 1898, and by Mitchell transferred to the Cobre Grande Copper Company, for the following reasons:

POINT I.

There is no necessity for a receiver to sue, because plaintiff as a minority stockholder has the right to institute all suits and redress all wrongs or injuries similar to the one complained of in this action, without the intervention of a receiver; and in Arizona it has been settled that a minority stockholder has the right to institute a proceeding of the kind here.

Wiser vs. Lawler, 62 Pac., 695, affirmed by the Supreme Court of the United States in 189 U. S., page 260.

And because in Arizona every action shall be prosecuted in the name of the real party in interest. Paragraph 1299, Revised Statues of 1901.

(a) Ordinarily, an action to enforce rights or protect the interests of a corporation should be brought in the corporate name.

(b) Where the officers or managers of a corporation refuse, upon proper request, to bring such action, it may be brought in the name of the stockholders.

Wright vs. Oroville M. Co., 40 Cal., 20.
Ashton vs. Dashaway, 22 Pac., 660, S. C., 23 Pac., 1091.
Hawes vs. Oakland, 104 S., 450.
Davenport vs. Dows, 18 Wall., 626.
Ide vs. Bascomb, 72 Pac., 63.

A suit thus brought by a shareholder is in behalf of

the corporation itself. In all such cases it is necessary to join the corporation as a party defendant, because the right asserted belongs to the corporation and it is an interested party.

Davenport vs. Dows, supra.
Moyle vs. L. Admrs., 83 Cal., 579.
Bell vs. Donahoe, 17 Fed., 710.
Smith vs. Ferries & Cliff House Ry. Co., 51 Pac., 715.
Danemeyer vs. Coleman, 8 Sawyer, 51; S. C., 11; Fed., 97.
Hawes vs. Oakland, 104 U. S., 450.
Smith vs. Dorn, 96 Cal., 73.

A corporation though joined as a defendant, is so far considered the real plaintiff, that if it be a resident of the State in which the action is pending, and the stockholder plaintiff be an alien, the Federal courts are ousted of jurisdiction.

Danemeyer vs. Coleman, supra.

All of these and numerous other cases in all jurisdictions show that relief will be granted for the benefit of the corporation and for its stockholders, upon the suit of a stockholder without the intervention of a receiver.

In *Burns vs. City of Atchison*, 29 Pac., 582, the Supreme Court of Kansas decides this precise question. It says:

> "It is said that the equitable jurisdiction of the court to appoint receivers is not to be doubtingly exercised, and never where there is any other adequate remedy; but in this case, as has been stated, there is neither authority nor necessity for providing the city of Atchison with a representative or receiver. It is a competent party in any proceeding to protect its rights as a stockholder, and

if the officers of the corporation have made fraudulent contracts, or are engaged in transactions which will result to the injury of the corporation or the city, as one of its stockholders, it may maintain an action in its own name to protect its own or the interests of the corporation, or to obtain any equitable remedy to which it is entitled. Ordinarily, an action to enforce rights or protect the interests of a corporation should be brought in the corporate name; but where the officers or managers of the corporation refuse, upon proper request, to bring such action, it may be brought in the name of the stockholders.

4 Amer. & Eng. Enc. Law, 280, and cases cited.

"It is conceded by both parties that, if a cause of action exists in favor of the city in this case, it may be prosecuted in the name of the city; and, if that is true, what reason is there for the appointment of a representative of the city, and what authority is there for the substitution of another as plaintiff in its stead? The counsel for the receiver argue at great length and cite numerous authorities to sustain the right of the city as a stockholder to bring the action, and thereby has furnished an argument against the appointment of a receiver, and his substitution in the place of the city. If a cause of action exists in favor of a stockholder, and the corporation refuses to proceed upon proper request, the city, as a stockholder, is a real and competent party to bring the action, and there is no necessity or reason in substituting a next friend or receiver to sue for it."

POINT II.

The court in this action and under the proof, has no right or authority to appoint a receiver, because no ultimate relief is sought, except the mere appointing of a receiver.

to Mr. Gage under the agreement of December 12, 1900, I don't know that I can give you all that was said or even approximate it, but the question came up, and I said that Mr. Gage ought to be paid for his services, he had been out a great deal of money and had spent a good part of his time for a year or more, and I said he ought to be paid for it, and Greene said, I can't do it, I am out just the last dollar and won't pay any more; Mr. Gage said to let it go and walked out. I took the matter up again and urged the payment of Mr. Gage's expenses and his salary, and for an hour or two that matter was discussed, and finally Greene said "put it in and I will pay it." (Tr., page 89.)

J. M. Jamison, called for plaintiff, testified, in substance, as follows:

Direct examination:

I was present at Judge Street's court in Phoenix when Mr. Chalmers submitted the case of the Cobre Grande Copper Company against Greene and others. It was Saturday the 13th of April, 1901, the law day. (Tr., page 89.)

Plaintiff's counsel then offered in evidence the resolution of the Board of Directors of the Cobre Grande Company of date April 3, 1901. (Tr., pages 89-90.)

Plaintiff then read from the clerk's minutes showing that the complaint in the present action was filed January 3, 1901; also showing the granting of an injunction in present action on April 11, 1901, and the service of injunction; also return attached to writ of injunction showing service on April 13, 1901, on Greene, the Cananea Consolidated Copper Company, the Greene Consolidated Copper Company, and on J. H. Martin, member of the firm of Barnes & Martin; also return of service of writ of injunction and papers attached

and read the writ of injunction April 11, 1901, and read from the files of the court in the present case the date of answer of Greene Consolidated Copper Company and the Cananea Consolidated Copper Company, February 22, 1901, and date of answer of Greene, February 9, 1901. Testimony closed. (Tr., pages 90-91.)

On September 18, 1902, the court made and filed its findings in writing. (Tr., pages 145-153.) And as conclusions of law decided that plaintiff was not entitled to any relief in the action; denied the application for appointment of receiver, and dismissed plaintiff's complaint, ordered judgment accordingly, and rendered judgment in favor of defendants. (Tr., pages 154-155.)

Plaintiff moved for a new trial on various grounds (Tr., pages 155 to 160), which was by the Court denied, and he appealed to the Supreme Court of the Territory.

The case came on for hearing in the Supreme Court of the Territory, and the judgment of the lower court was affirmed. (See opinion Tr., pages 169 to 174.)

Petition for rehearing was filed in the Supreme Court of the Territory, and denied (Tr., pages 174 to 181 and 215), and the case is now brought here by appellant for review in this Court on a statement of the facts of the case in the nature of a special verdict found in the transcript (pages 193 to 200), being the same findings made in the court below.

FINDINGS.

The findings of the Supreme Court of the Territory, briefly stated, are as follows:

It finds the organization of the corporations, the residences of the parties, the capitalization of the Cobre Grande Copper Company, the officers of the Cobre

Grande Company and their resignation, as alleged in the pleadings.

That Hallenborg and Addicks were stockholders when the suit was commenced, and that Hallenborg was the owner of the notes mentioned in plaintiff's complaint.

That the Cobre Grande Copper Company was engaged in a series of law suits with defendants, Mitchell and Greene, and their associates in Sonora, in Arizona, in Texas and in New York.

That in suit No. 3437, at Phoenix, Arizona, brougnt by the Cobre Grande Copper Company against Greene, Mitchell and the Phoenix National Bank, the said Company alleged, among other things, all the facts set forth in paragraph 3 of plaintiff's original complaint in this action, and prayed for an accounting against Greene for the products of the mines, and for the supplies, material and property of the Company alleged to have been taken and appropriated by him; and issues were joined by the defendants in that action, and finally resulted in a judgment for defendants dismissing plaintiff's complaint. That said judgment has not been appealed from or taken up by the writ of error or proceedings to the appellate court.

That plaintiffs were stockholders in the Cobre Grande Company at that time.

That in November, 1898, Greene owned certain property in Sonora and had options to purchase other properties there, being the same mentioned in plaintiff's complaint.

That in said month Greene executed an option on said property to defendant, Mitchell; that the option contract provided that Mitchell should pay $12,500 in cash, $37,500 to be paid on or before November 26,

1899, and $100,000 on or before November 26, 1901, and $100,000 on or before November 26, 1902.

That Greene and Mitchell in April, 1899, with other parties, organized the Cobre Grande Copper Company; that 199,995 shares of the stock of said Company were turned over to Mitchell in consideration of his option from Greene, which option was afterwards assigned to the Cobre Grande Copper Company, subject to the rights of Greene therein. That the Cobre Grande Copper Company entered upon the property and began to operate the same in September, 1899.

That in October of 1899 controversies arose between Cobre Grande Copper Company and Greene over the option and right of possession of said property, and that Greene entered into possession about that time. Thereupon the Cobre Grande Company instituted a suit in Sonora to recover possession of the property, and a suit in Maricopa County, No. 3437, to restrain the delivery to Greene of the deeds which were put in escrow under the contract with Mitchell and thereafter assigned to the Cobre Grande Company.

That a temporary injunction was granted in No. 3437 restraining the Phoenix National Bank, as escrow holder, from delivering the escrow papers, and restraining Greene from demanding or receiving same from the bank.

While this litigation was in progress, a majority of the stockholders of the Cobre Grande Company, to the extent of 115,049 shares or thereabouts, entered into a pooling arrangement by which said stock was delivered to E. B. Gage, with power to vote the same at all meetings, and granting to Gage the right to dispose of said stock at his discretion.

That on January 5, 1900, Gage, as trustee, entered into a contract with one Benjamin Orne for the sale

mined; but this is only by virtue of his interest in the property and that it is being wasted.

See *Cook on Corporations,* Vol. 2, Secs. 746-747, 4th Ed., where the New York statutes and rule are discussed.

In *Attorney General vs. The Utica Ins. Co.,* 2 Johnson's Chancery, 375, Chancellor Kent holds that a court of equity has no visitorial powers over corporations and no power to remove the officers appointed by the charter to manage the business of the corporation; and in the same case held that the directors of a corporation are accountable to a court of equity for a fraudulent breach of trust.

The same effect,

Matter of *Binghamton Gen. Electric Works,* 143 N. Y., 263.

Atty. General vs. Niagara Bank, Hopkins Ch. (N. Y.), 354.

Waterbury vs. Mchts. Union Express Co., 50 Barb. (N. Y.), 157.

Verplank vs. Mercantile Ins. Co., Edwards Ch. (N. Y.), 84.

Hand vs. Dexter, 41 Ga., 454.

Hamilton vs. Accessory Transit Co., 3d Abbott Pr. (N. Y.), 255.

French vs. Gifford, 30 Iowa, 148.

Vanderbilt vs. Central R. Co., 43 N. J. Eq., 669.

In Arizona, in the Revised Statutes of 1887, Sec. 233, among other things the following powers are conferred upon corporations: subdivision 2: To sue and be sued by the corporate name; subdivision 6, to make contracts, acquire and transfer property, possessing the same powers in such respect *as private individuals now enjoy;* and Sec. 234, in subdivision 5, provides by what officers or

persons the affairs of the corporation are to be conducted and the times at which they are to be elected.

Sec. 765 Rev. St. Arizona, 1901, has similar provisions to Sec. 233, St. of 1887 and Sec. 766 as amended by Act of Leg. of 1903, p. 140, has provision like Sec. 234.

The articles of incorporation of the Cobre Grande Company introduced in evidence specifies that the business of the company shall be managed by a board of directors. The statute and the articles of incorporation, taken together, prescribe the powers of the Cobre Grande Company; the tenure of its officers and the mode of their election. What power has a court of equity to set aside the statute or impose other conditions upon them, otherwise than as provided in the statute? The charter measures its power and the manner of conducting its business and the persons who shall conduct it.

The cases above referred to also hold that the only method of forfeiting the charter of a corporation is by proceeding in the nature of *quo warranto*, and this is in exact accordance with the rule prescribed in the Revised Statutes of Arizona of 1901. Paragraph 28 provides: "that no corporation formed under the laws of this Territory shall be dissolved, or its rights impaired except by judicial procedure;" and the corporation, having received its life through the legislative grant above mentioned, can only be forfeited by the power that granted it. Par. 772 is a further limitation upon the powers of the court. That section provides that the corporation shall not be dissolved prior to the period fixed upon in the articles of incorporation, except by a majority vote of the members, except a different rule is adopted in the articles, and Par. 775 provides: "that corporations whose charters expire by their own limitations or by the voluntary act of the stockholders may, nevertheless, continue to act for the

purpose of closing up the business, but for no other purpose, unless renewed as in this chapter provided."

Where the statute prescribes a particular method for dissolving a corporation, that method must of course be pursued.

People vs. P. & T. Co. of C., 38 Cal., 172-173.

We have shown that the appointment of a receiver is in effect the dissolution of the corporation; then it must follow that the appointment sought for in this action is prohibited by the sections of the Revised Code above quoted.

A corporation has the same power over its corporate property, and is capable of taking and holding property, as wholly as natural persons, except in so far as they are restrained by statute. That under this general power, unless restrained by statute, a corporation may dispose of the whole of its corporate property, for any lawful purpose without the assent of its stockholders.

People vs. P. & T. Co of C., 38 Cal., 171-172.

This case holds that property of a corporation can be disposed of without the assent of the stockholders, under a section of the California Code, which is nothing like so broad as the paragraph of the Revised Statutes of Arizona of 1901, which gives the directors the power to make contracts as freely as individuals.

In 1880 the California legislature passed a statute, the first section of which provides as follows: "That it shall not be lawful for the directors of any mining company to sell, lease, transfer or otherwise dispose of any part of the mining ground owned or held by said corporation, nor to purchase or obtain in any way additional mining ground unless such act be ratified by the

owners of at least two-thirds of the capital stock of such corporation," and provision is made as to the method of ratification.

In the case of the *Granite Gold Mining Co. vs. Merginness*, 50 Pac., 269, 118 Cal., 132, the Supreme Court of that State, in construing this statute, held that the general presumption of the power of corporations to buy and sell real property must prevail except in those cases where the facts appearing of record show that the case is within the restrictions of the Act of 1880, and that a sale is valid without the assent of the stockholders, unless it appears that the sale and conveyance are of its mining ground, for the reason that the restriction of the statute applies not to a sale of its property generally, but only to that of its mining ground. In other words, that the plaintiff in that case was required to show that he was within the exception of the statute.

In *Williamette Mfg. Co. vs. Bank of British Columbia*, 119 U. S., 191, the question was whether a corporation had the right to mortgage its franchise.

Appellants in that case, as in this, argued that a corporation could not do that because it destroyed the purposes for which the corporation was formed.

The statute creating the franchise gave to the corporation "the exclusive right of the hydraulic powers and privileges created by the water it takes from the Santiam River, and declares that it may use, rent *or sell* the same, or any portion thereof, as it may deem expedient."

The Court by Mr. Justice Miller said:

"The charter itself seems to have given unlimited power to the Company to sell everything it had * * * and held that the power to sell included the power to mortgage." In other words, the Supreme

Court in that case held what the courts have always held, that the charter is in measure of the power of the corporation, and that it could do anything that its charter authorized it to do.

The statute in Arizona, like the statute of Oregon, mentioned in the *Williamette Company case*, 119 U. S., 191, is an enlargement of the powers of the corporation.

Plaintiffs claim that the result of the contract of December 12, 1900, destroys their rights, and even go so far as to claim that the property of the Cobre Grande Copper Company was disposed of without consideration, and that they were deceived by concealment of secret provisions with reference to the $60,000 paid by Greene, which went into the treasury of the company.

In the first place, Mr. Gage did not, nor did anybody, attempt to sell, or in fact sell any of the property of the Cobre Grande Copper Company. In the next place there was no concealment whatever. The only property sold by Mr. Gage, as agent or representative or otherwise, were the shares of the several stockholders who entered into the pooling agreement, and which were owned by them in private proprietorship. (Findings V, VII—VIII; Trans., pages 195-198, inclusive.)

The court found that Mr. Gage consulted the directors and a large majority of the stockholders of the Cobre Grande Copper Company, and they urged him to enter into said contract with Greene for the sale of the stock. That said stock represented by Mr. Gage (participating in said contract) comprised the entire stock of the Cobre Grande Copper Company, including Hallenborg's 8,000 shares, except that owned by Greene and his associates, and about 6,500 shares owned by other parties.

The court also found that the contract of December 12, 1900, was entered into by Gage in good faith, with the full knowledge and consent of the directors of the Cobre Grande Copper Company, and upon advice of counsel of the company that it could not successfully maintain its suit, No. 3437, in Maricopa County, and with the belief on the part of Mr. Gage that said contract was to the best interest of said Company and its stockholders. (Trans., page 198.)

Their argument is that the agreement of December 12, 1900, was on its face a constructive fraud. The court has found that there is no actual fraud, and the authorities are abundant to the effect that where there is no actual fraud in a sale, even by a corporation to one of its directors, corporate creditors can not attack it for constructive fraud arising from the trust relationship between the purchaser and the corporation.

Crymble vs. Mulvaney, 40 Pac., 499.

POINT IV.

If the agreement of December 12, 1900, was constructively fraudulent, it had been ratified by the directors and by a majority of the stockholders, and there can be no question but what the acts constituting constructive fraud can always be ratified, except in the few instances where the statutes make certain acts conclusively fraudulent.

Twin Lick Oil Co. vs. Marbury, 91 U. S., 589.

In *Gamble vs. Water Co.,* 123 N. Y., 91; 25 N. E. 201, a director, was permitted to contract with his corporation where a majority of the shareholders being fully apprised of the nature of the transaction authorized it. If it can be authorized it can be ratified.

In this case the sale of the stock by Mr. Gage was not only authorized in advance, but his action was ratified subsequently by the directors and by a majority of the stockholders.

In addition to this there is no rule of law or morality that we know of which would prevent the owner of property selling it to whom he pleased, or that forbids a director of a corporation to resign at his pleasure.

POINT V.

The appointment of a receiver is one of discretion in the court to be exercised as an auxiliary to the attainment of the ends of justice: is of high and unusual character, and is never exercised, because the appointment can do no harm. In order to obtain the appointment of a receiver, plaintiff must show, in cases where the property is in possession of defendant: first, that he has a clear title to it; and secondly, that the possession of the property by defendant was obtained by fraud.

It is also held that the discretion of the court to appoint a receiver will not be exercised where no perceptible benefit will result from the appointment, but great confusion and difficulty, and probably great injury to both parties, while no injury will apparently be caused by failing to make the appointment.

Hamburg Mfg. Co. vs. Edsall, 8 N. J. Eq., 142.

The record shows that the Cobre Grande Company is not in possession, but that Greene, or the Greene Company, is, and in the absence of any proof or finding of fraud the presumption of law is that they are rightfully so. Fraud is never presumed, but must be proved.

We have shown in the preceding pages of this brief that plaintiffs can secure by suit brought by them on behalf of the Cobre Grande Company every relief that

a receiver or that the Company itself could obtain if brought in its own name, and that it is unnecessary to appoint a receiver to sue on their behalf.

If the court were to appoint a receiver, his jurisdiction would not extend beyond the Territory of Arizona. The receiver's remedy, if any he has, would be just such as the corporation has. And, if the corporation were to sue in Sonora, its only remedy would be for the recovery of the possession of the property there, and plaintiffs as stockholders can sue there by showing the failure or refusal of the corporation to sue, just as the records show they have done in New York.

Plaintiffs claim that because the agreement of December 12, 1900, provides for the payment to Mr. Gage of 5,000 shares of the Greene Consolidated Company's stock for his own use, and 5,000 more for the use and benefit of Chalmers and the other attorneys for the Cobre Grande Copper Company, that they were injured, and that it was a fraud upon their rights.

The findings of the court show that there was no concealment about this matter, and that Mr. Gage acted in good faith; that the directors and a majority of the stockholders, including Mr. Hallenborg, one of the plaintiffs, were fully advised of the settlement; that the directors and a majority of the stockholders urged it; that said 5,000 shares agreed to be paid to Gage was intended by all the parties for compensation to him for services rendered as president of the Cobre Grande Copper Company, and for the time, labor, trouble and attention given to said Company's business, and for money advanced to a d for said Company, and for expenses paid in attending to the affairs of the Company, and in connection therewith. That this is perfectly lawful under the authorities there can be no question.

Thompson on Corporations, Vol. 3, Section 4025, lays down the rule as follows:

> "The rule deducible from the authorities that a "trustee is prohibited from making a profit out of "his trust relation, means that he must not make "a *secret profit* out of it. His duty is not to avoid, "wholly, the doing of anything for his own benefit, "his obligation to the beneficiaries in the trust is to "make a full, fair, and complete disclosure of all "the circumstances attending any transaction which "will benefit himself in any manner different from "the manner in which all the shareholders will be "benefited."

To the same effect:

> *Twin Lick Oil Co. vs. Marbury,* 91 U. S., 587.
> *Pneumatic Gas Co. vs. Berry,* 113 U. S., 322.
> *Oglesby vs. Atrill,* 105 U. S., 605.
> *Roy & Co. vs. Scott H. & Co.,* 39 Pac., 679.

In this instance Gage made no profit; he was simply paid for his services, time and money expended.

A director or trustee is entitled to pay in a reasonable amount for such services as he may render outside of the duties of his office of director or trustee.

> *Bassett vs. Fairchilds,* 61 Pac., 791; 132 Cal., 637.
> *Corinne Mill C. & D. Co., vs. Toponce,* 152 U. S., 405.

The objection to Chalmers and others receiving 5,000 shares, or in lieu thereof $50,000, in payment for their services as attorneys, is equally untenable. Corporations cannot avoid payment of their atorneys' fees any more than other people, and the finding is, their charge was reasonable.

POINT VI.

Plaintiffs cannot recover in this action, because they have not offered to do equity, either on their own behalf or that of the corporation.

Their claim of ownership to the mines mentioned in the complaint is based upon an option contract made between defendants Greene and Mitchell. This contract was subsequently transferred by Mitchell to the Cobre Grande Copper Company, subject to Greene's rights therein. By its terms Mitchell was to pay Greene $12,500 at the time of its execution; $37,500 was to be paid on or before November 26, 1899; $100,000 on or before November 26, 1901; and $100,000 on or before November 26, 1902. Time of payment was made the essence of the contract. The Cobre Grande Company assumed Mitchell's obligations. None of the deferred payments have been made nor do defendants or the Cobre Grande Copper Company offer to pay the same. Their claim is, that because Greene got possession of the property before the first payment of $37,500 became due, he prevented the Cobre Grande Company thereby from *the chance of finding ore, extracting, smelting it, getting it to and finding a market for it, selling it, and out of the proceeds raising the money with which to pay these deferred payments.* And therefore they ask the court to make a new contract and extend the time of payment of the sums due Greene under the contract between him and Mitchell of which the Cobre Grande Company is assignee until after it shall be restored to possession of said mines, etc. (Tr., p. 11, folio 16.)

It is a well settled rule of law, that if a party by his contract charges himself with an obligation *possible* to be performed, he must make it good unless his perform-

In *Murray vs. Superior Court*, 129 Cal., 632, 62 Pac., 191, the court uses this language:

> "There is of course no such thing as an action "distinctly brought for the appointment of a re- "ceiver. Such an appointment when made is "ancillary to or in aid of the action brought. Its "purpose is to preserve the property pending the "litigation, so that the relief awarded by the judg- "ment, if any, may be effective. The authority con- "ferred upon the court to make the appointment "necessarily presupposes that an action is pending "before it instituted by some one authorized by law "to commence it."

This is in accordance with all the authorities found in the books on the subject.

In *Enc. of Pl. & Prac.*, Vol. 17, p. 681, the author says:

> "The appointment of a receiver is not the ultimate end and object of litigation, but is merely a provisional remedy to control and preserve property pending litigation, that the relief awarded, if any, may be effective."

The same doctrine is laid down by Mr. High in his work on receivers, Sec. 6, pages 7 and 8; and

> "The appointment of a receiver is regarded as one of the most difficult and embarrassing duties which a court of equity is called upon to perform. It is a peremptory measure, whose effect, temporarily, at least, is to deprive of his property a defendant in possession, before a final judgment or decree is reached by the court determining the rights of the parties. It is, therefore, not to be exercised doubtingly, but the court must be convinced that the relief is needful, and that it is the appropriate means of securing an appropriate end. It is regarded as a severe remedy, not to be adopted save in a clear case, and never unless plaintiff would otherwise be in danger of suffering irreparable loss."

High on Receivers, Sec. 3.

Smith on Receivership, Sec. 2, says:

"The law of receiverships is peculiar in its nature in that it belongs to that class of remedies which are only ancillary or provisional, and the appointment of a receiver does not affect either directly or indirectly, the nature of any primary right, but is simply a means by which primary rights may be more efficiently preserved, protected and enforced in judicial proceedings. * * * It leaves the parties as they have placed themselves as determined by the final judgment or decree of the court."

See also *Pom. Equity*, Paragraphs 171, 1319 and 1330.

Miller vs. Bowles, 58 N. Y., 253.

POINT III.

A court of equity has no inherent power, in the absence of statutory authority, to appoint a receiver upon the application of a private person, except in cases of public or quasi public corporations, such as railroads, which are required to be kept going concerns, or in favor of judgment creditors, who have liens, or mortgagees who have liens, or in cases of infants, lunatics and formerly married women; because the effect of the appointment is to dissolve the corporation, and it having received its life from the state by its charter or general law, the State only can dissolve is. Ever since the decision in the Dartmount College case, it has been held that a corporation is a contract entered into between the sovereignty and the corporation. This contract cannot be annulled or interfered with by any action on the part of the courts. On the contrary they have upheld them, and for this reason clauses have been inserted in almost

every State constitution reserving to the State the right to modify or repeal the charters.

In *Neal vs. Hill,* 16 Cal., 150, this question was carefully considered by the Supreme Court of California, and it was there laid down as settled law that the appointment of a receiver must necessarily result in the dissolution of the corporation, and in that event the court will have accomplished in an indirect way that which in this proceeding it has no authority to do directly. That it was well settled that a court of equity, as such, has no jurisdiction over corporate bodies, for the purpose of restraining their operations or winding up their concerns, and the court adds, "that we do not find any such power has ever been exercised in the absence of a statute conferring the jurisdiction."

In 1873 the California legislature adopted part of the provisions of the New York code, but omitted to adopt certain independent provisions of that code, to the effect that a receiver of the property of a corporation could be appointed upon the petition of the execution plaintiff, when the execution issued upon a judgment rendered against the corporation had been returned unsatisfied in whole or in part, and when a corporation should have been declared insolvent for one whole year, or for that length of time had neglected or refused to pay its notes or other evidences of debt, or had for one year suspended its regular business.

In the celebrated *French Bank case,* 53 Cal., 495, the court held that these omitted provisions created rights in favor of private persons that did not exist before and enlarged the powers of the courts of equity in the State of New York by directly and in terms authorizing them in such cases to appoint receivers of the property of corporations upon application made to them by creditors.

stockholders and other private parties instituting proceedings for that purpose, and held: That in the absence of any such authority conferred by statute, a court of equity had no jurisdiction to make such an appointment, either under the statute or under the usages of courts of equity. In Arizona there is no statute conferring jurisdiction on courts of equity to appoint receivers except by usages of courts of equity. Section 1541, Rev. Stats. Arizona, 1901, is in substance the same as Subd. 6, Sec. 564, of California Code of Civil Procedure, which limits the power of the court to appoint a receiver to cases allowed by usage of equity.

These decisions have been affirmed by the Supreme Court of California in

Murray vs. Superior Court, 129 Cal., 631, 62 Pac., 191.

State I. & I. Co. vs. San Francisco, 101 Cal., 146 and cases cited from New York and other States.

Fisher vs. Superior Court, 110 Cal., 140, and various other decisions in that State.

The Court of Appeals of New York in *Decker vs. Gardner,* 124 N. Y., 334, holds that the jurisdiction to appoint receivers of corporations is wholly statutory and never was exercised by a court of chancery until their jurisdiction was enlarged by statute.

We have heretofore stated, that where the plaintiff has an interest in the property, for instance by vendor's lien or a mortgage, or by virtue of a judgment lien, and that the property is being wasted, that pending foreclosure proceedings, a court of equity has the power without statute to appoint a receiver to preserve the property until the litigation can be settled and deter-

entitled to relief even in an action directly assailing the judgment, for the reason that they could not aver and prove that they had a good cause of action on the merits, it being apparent from the record that they rely upon an option for the purchase of the Sonora mines which they have not complied with, or offered to comply with, and it is now too late (*Hansbrough vs. Peck supra*); and the allegations of plaintiff's complaint, if Judge Sloan's court had jurisdiction, are wholly insufficient to entitle them to any relief in any court under any rule of practice known to courts of chancery. The matters required to be shown in suits to set aside judgments are fully set forth in *Whitney vs. Kelley*, 94 Cal., at pp. 153 et seq., and it is sufficient to say here that planitiffs' complaint does not come up to the requirements.

In *Avegno vs. Schmidt*, 113 U. S., 301-2, the Court says:

> "The decree of a court of competent jurisdiction cannot be collaterally attacked by averring and proving that there was a good defense to the suit if the defendant had chosen to make it."

The contention on the part of plaintiffs that they are not bound by the decision of the District Court of Maricopa County is untenable.

In *Hawkins vs. Glenn*, 131 U. S., 329, the court says:

> "A stockholder is so far an integral part of the corporation that, in view of the law, he is a privy to the proceedings touching the body of which he is a member,"

and then quotes from *Sanger vs. Upton*, 91 U. S., 56, 58, as follows:

> "It is not necessary that the stockholders should be before the court when the order was made, any more than they should have been there when the decree of bankruptcy was pronounced. The plain-

tiff in error could not in this action, question the validity of the decre and for the same reasons could not draw into question the validity of the order. She could not be heard to question either except by a separate and direct proceeding had for that purpose."

The remedy for plaintiffs, if any they have, is to sue in Maricopa County directly, to vacate the judgment in No. 3437. This court cannot retry that case in this one; otherwise one court of concurrent jurisdiction would review the judgment of another, and litigation would never end.

The plaintiff's complaint is full of the words fraudulent, and corrupt, and general charges of conspiracy, combinations and violations of trust obligations. Mere words in and of themselves, but even as qualifying adjectives of more specific charges, they do not allege sufficient grounds of equity jurisdiction, because the transactions to which they refer are not such as in their essential nature constitute a fraud or a breach of trust for which a court of chancery can give relief.

Ambler vs. Choteau, 107 U. S., 590-591.

We respectfully submit that the judgment of the lower court should be affirmed.

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